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IN THE

Supreme Court of the United States

October Term, 1970

No.

LEONARD DUNCAN, ET AL.,

Petitioners,

v.

HAROLD CRANSTON, ET AL.,

and

ALBERT GARIBIAN, ET AL.,

and

CLIFFORD M. HARDIN,
Secretary of Agriculture,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, over 40 "non-nearby" dairy farmers whose farms are so located as to require them to pay a nearby differential under the Connecticut Federal Milk Marketing order[1] to other dairy farmers located almost

[1] 7 C.F.R. 1015.72 (1968). Although the nearby differential provision of the Connecticut Order was held illegal by the United States Court of Appeals for the Second Circuit on July 16, 1970, pursuant to the decision of this Court in the consolidated cases of

(continued)

exclusively within the State of Connecticut and who unsuccessfully attempted to intervene in the United States Court for the Northern District of New York to challenge the adequacy of representation in this suit and its maintenance as a class action and to seek other relief thereon, humbly petition for a writ of certiorari to review that part of the judgment of the United States Court of Appeals for the Second Circuit which upheld the decision of the District Court denying intervention and which held that this suit was a proper class action in which the plaintiffs' class was adequately represented and accorded due process in conformity with the Federal Rules of Civil Procedure and that the suit was adversary in nature rather than collusive as a matter of law and otherwise, as well

[1] (continued) *Frederick T. Zuber Et Al. v. Russell Allen Et Al.* and *Clifford M. Hardin, Secretary of Agriculture v. Russell Allen Et Al.*, decided December 9, 1969, 396 U.S. 168, the United States District Court for the Northern District of New York issued a temporary restraining order against the Secretary of Agriculture on August 5, 1970, restraining him from terminating said nearby differential pending a hearing on whether the illegal nearby differential may be "phased out" on a graduated basis over a minimum period of one year. Consequently, the Connecticut nearby differential is in full force and effect more than a year after this Court's decision in the *Zuber* case and is being prolonged through repeated delays and filings and through the mutual consent of counsel for the opposing nearby producers who intervened in the District Court as defendants and counsel for the named plaintiffs. Both have succeeded in continuing the escrowing in this case in spite of repeated attempts by petitioners to terminate the neaby differential and stop the escrowing thereunder, and the attorneys for the named plaintiffs (non-nearby producers) and the defendant-interveners (nearby producers) have jointly proposed the continuation of the nearby differential as aforesaid in seeking a minimum of $500,000 attorneys' fees from the escrow fund of approximately $1 million on a percentage basis.

as from that part of said judgment which would authorize the District Court to disburse any portion of the escrow fund to defendant-interveners nearby producers and to award attorneys' fee therefrom to counsel for defendant-interveners and named plaintiffs or to possibly entertain proceedings to rewrite and extend the illegal nearby differential over a period of time and prevent its immediate termination after repeatedly intentional and frivolous delays.

OPINION BELOW

The Per Curiam opinion of the Court of Appeals is reported at 428 F.2d 822, and that of the District Court at 290 F.S. 785. The temporary restraining order issued by the District Court on August 5, 1970 restraining the Secretary of Agriculture from terminating the nearby differential is set forth in appendix E to this petition. Neither the Secretary nor the named plaintiffs took any appeal from such temporary restraining order, but the case is presently in the Court of Appeals pursuant to motions for supplementation of that Court's decision in respect to jurisdiction of the District Court thereunder to entertain the joint proposal for continuation of the escrowing and phasing out of the illegal nearby differential over an extended period.[2] The petitioners were denied a stay of

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[2] In view of the fact that the counsel for named plaintiffs and defendant-interveners intended to seek a supplementation of the decision of the Court of Appeals of July 16, 1970, after ascertaining that this Court had granted an extension of time to December 12, 1970, for the filing of this petition herein, and inasmuch as these petitioners believed that additional delay would be sought by them through piece-meal submissions of motions and memoranda and requests for unneeded oral argument and that no open and definitive action would be taken by the parties until petitioners were out of this case, the petitioners themselves filed a motion in

(continued)

judgment in respect to their appeals concerning inadequacy of representation, improper class action and collusion as a matter of law and otherwise by the Court of Appeals Order of September 10, 1970, set forth in appendix D hereof, and that Court has taken no definitive action in respect to petitioners' prior and present requests for immediate termination of the nearby differential and cessation of escrowing thereunder in accordance with the decision of this Court in *Zuber v. Allen*. Petitioners have also moved the Court of Appeals for a stay of disbursement of any part of the escrow fund in respect to any award other than to the non-nearby producers and have requested immediate disbursement thereof to the non-nearby producers.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1970, as aforesaid, and is set forth in appendix C hereof. By order of October 8, 1970, the Honorable Mr. Justice Harlan extended the time for filing for a writ of certiorari to and including December 12, 1970.[3] The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1), 2101(c) and 2106.

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[2] (continued) the Court of Appeals on October 17, 1970, requesting any needed clarification and an Order directing the immediate termination of the differential and the escrowing thereunder. Petitioners took the position that no clarification was actually required in respect to the ordering of such immediate relief, but they had also unsuccessfully sought that relief on a number of occasions commencing on January 14, 1970, in the Court of Appeals after this Court's decision of December 9, 1970, in *Zuber v. Allen*.

[3] The petitioners original due date for the filing of their petition was October 14, 1970. As their motion for an extension of time

(continued)

[1] (continued) reflects, they were not notified of any of the proceedings in the District Court pertaining to continuation of escrowing, extension of the illegal nearby differential, or application for counsel fees by the attorneys for the opposing producers, both of whom lost this suit which was determined solely by this Court's decision in *Zuber v. Allen* and who were also guaranteed or paid a fee for their services herein. When a representative of petitioners and one of their counsel indirectly ascertained that a hearing was to be held in respect to such matters in the District Court on September 23, 1970, and appeared in the courtroom as the only persons in the spectator's section thereof, the counsel for the parties thereupon succeeded in having such hearing removed to chambers, with said representative and counsel for petitioners denied permission to sit in thereon, and the said proceedings were then continued to October 14, 1970, the last day for the filing of any petition by petitioners in this Court concerning the aforesaid matters in order that they might still have some claim concerning entitlement to be heard and notified of proceedings in this suit. However, the time for filing said petition was extended for 60 days by Mr. Justice Harlan, but the resultant additional delay thereafter in the District Court and presently in the Court of Appeals where delaying oral argument is being sought on the matter of extending the illegal differential for at least another year has again resulted in petitioners being unable to protect their interests in this suit unless their petition for certiorari is granted, in that the parties would claim that petitioners had no standing to question any jointly proposed action taken by the parties respective counsel after the running of the time to petition for certiorari or the denial thereof. In fact, counsel for the named plaintiffs and for the defendant-interveners have consistently maintained that the petitioning dairy farmers are not parties to this suit and consequently need not be served with any pleadings or notified of any of the proceedings or even be allowed to attend any hearing in this suit.

In respect to the jurisdiction of this Court to act in directing disbursement of the escrow fund even if this suit was collusive as a matter of law or otherwise, the parties have admitted the illegality of the Connecticut nearby differential, and the cases set forth on page of this petition support the jurisdiction of the Court in this regard.

STATUTES, RULES AND REGULATIONS INVOLVED

This case primarily involves a question as to whether it was collusive as a matter of law or otherwise, and the only Rules involved are those of the Federal Rules of Civil Procedure pertaining to joinders of persons needed for a just adjudication (Rule 19); class actions (Rule 23); intervention (Rule 24); depositions and discovery (Rule 30); and summary judgment (Rule 56). The case in the District and Appellate Courts involved the Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, particularly Section 608c(5) thereof, but in view of the admitted illegality of the nearby differential the statute is not set forth herein. The relevant regulation involved is 7 C.F.R. 1015.72, the nearby differential provision of the Connecticut Federal Milk Marketing Order, and it is found at page 15 of appendix G hereto.

STATEMENT OF THE CASE

The nearby farm location differentials existed in but three of approximately seventy-five Federal milk orders when the case of *Blair v. Freeman*, 370 F.2d 229, challenged the nearby differential of the New York-New Jersey Milk Marketing Order. On November 18, 1966, the U.S. Court of Appeals for the District of Columbia ruled that such nearby differential was a fundamental violation of the Agricultural Marketing Act of 1937 and beyond the statutory power of the Secretary of Agriculture. On January 11, 1967, the U.S. District Court for the District of Columbia granted a preliminary injunction in the case of *Russell Allen, et al v. Orville Freeman, Secretary of Agriculture*, which challenged the nearby farm location differential of the Massachusetts-Rhode Island Milk Marketing Order. The government's brief filed in the *Blair* case had admitted that the first nearby farm location differential of the 1937 Greater Boston milk order, predecessor of the nearby differential of the Massachusetts-Rhode Island milk order, was "identical in purpose and effect" to that of the N.Y.-N.J. nearby differential and "predicated on very similar findings." The detailed identity of the two nearby differential provisions was related over several pages of the Secretary's brief in *Blair*, and the Secretary also acknowledged therein that he had always construed Section 8c(5)(B)-(ii)(c) of the Act as constituting authority for the promulgation of the nearby differential as an adjustment to the uniform minimum price for "the locations at which delivery of such milk is made". He admitted that both nearby differentials "were promulgated on the basis of the same statutory provision", further stating as follows:

> "Thus, dating almost to the very enactment of 7 U.S.C. 608c(5)(B)(c) the Secretary has construed *that* provision as permitting the very type of nearby differential which the appellants would have this Court declare unauthorized. It is, of course, axiomatic that such a *long-standing contemporaneous* administrative construction of the Section by the official charged with its administration is entitled to great weight."

The Secretary's brief in *Blair* also quoted approvingly from the relevant Congressional Reports defining the "market" differential authorized under subsection (a) of the Act to illustrate that the nearby differential could not be justified as the authorized market differential but only as the location differential authorized under subsection (c) of the Act. The *Blair* decision recognized that "the 'market differential' rationale is plainly not a tenable basis for the nearby differential", and it noted that "no justification on this ground is even attempted in either the Secretary's findings or the Brief for Appellee."[4]

In view of the foregoing admissions made in *Blair*, the defendant Secretary was unable to present any plausible defense or distinguishment in respect to the nearby

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[4] The *Blair* decision recognized that the market differential was the "direct-delivery differential" of the N.Y.-N.J. order which provides for an adjustment to the uniform price when milk is delivered directly to a city plant or market instead of initially to a country plant for re-shipment to the city plant or market. This "customary market differential" is a part of the zone differential of the Mass.-R.I. and also the Connecticut milk order.

differential of the Mass.-R.I. order when the *Allen* plaintiffs sought a preliminary injunction on January 11, 1967. As counsel for the nearby producers in *Allen* later phrased it in argument before the appellate court, "the defendant dug his own grave in the *Blair* case."

It was clear that it would be only a matter of time before suit would be filed challenging the nearby differential of the Connecticut federal order, and the institution of such suit in the District of Columbia would almost certainly result in a favorable decision for non-nearby producers, particularly since the findings of the Secretary in promulgating the Connecticut nearby differential in 1959 were almost identical to those made by him in 1957 when the nearby differential of the N.Y.-N.J. order was promulgated. Certiorari by the Supreme Court would be unlikely if three separate unanimous decisions from the same Circuit had ruled the three nearby differential provisions to be illegal.

The only possibility of ultimately prevailing in the *Allen* case and in securing a conflict in respect to the impending challenge to the Connecticut nearby differential necessitated that a suit be filed immediately in another federal jurisdiction against the Connecticut differential. Such different jurisdiction would also enable the Secretary's and nearby producers' counsel to avoid in large part the admissions that were a matter of record in the *Blair* and *Allen* cases.

The defendant-interveners below were represented by Attorney Conard of the law firm of Shipman & Goodwin of Hartford, Connecticut, and said attorney and firm are also counsel for the Connecticut Milk Producers' Association (CMPA), consisting almost entirely of "nearby" producers. The CMPA, now known as the Consolidated

Milk Producers' Association, filed briefs *amicus curiae* in the district and circuit courts in the *Blair* case on behalf of nearby producers and the continuation of the nearby differentials. Reuben Hall, Esquire, of Boston, Massachusetts, was on both of said briefs, as was the law firm of Klagsbrunn & Hanes of Washington, D.C., represented by Lawrence Hollman, Esquire, and Carlyle Ring, Esquire. When the CMPA attempted to intervene in the *Allen* case, it was again represented by Mr. Hall and the latter two attorneys, and Mr. Hollman and Mr. Ring thereafter represented the 6 individual "nearby" producers who were allowed to intervene in that case. Attorney Conard also participated therein in behalf of Connecticut nearby producers and Mr. Hollman and Mr. Ring not only claim association with Mr. Conard in this present case but have acted as Mr. Conard's Washington associated counsel in the related case of *Herrington v. Freeman*, C.A. No. 2861, in the U.S. District Court for the District of Columbia. In addition, Attorney Hall testified as the main witness for the defendant-interveners in the *Cranston* case at the request of Mr. Conard, and the CMPA officials admittedly maintained the defense in this case in the name of the three intervening "nearby" producers, an arrangement that also existed in the *Allen* case.

This suit was filed against Orville Freeman, U.S. Secretary of Agriculture, on February 9, 1967, in the U.S. District Court for the Northern District of New York at Albany, N.Y. The plaintiffs were three dairy farmers from the Troy, N.Y., area, Harold R. Cranston, Dale R. French and Helmer A. Carlson, whose farms are so located as to render them ineligible for the "nearby" farm location differential payments of the federal order regulating the handling of milk in the Connecticut milk marketing area. 7 C.F.R. 1015.72.

The record below discloses that, prior to the institution of this suit, Attorney Conard contacted the U. S. Department of Agriculture after the entry of the preliminary injunction in the *Allen* case to ascertain if the nearby differential could be suspended by the Department pending a final decision in any litigation concerning the legality thereof.[5] The Department informed him that this would not be possible, and this suit was filed almost immediately thereafter. The *Cranston* complaint

[5] One objective of such attempt was to destroy the escrow fund as the source of attorney fees and expenses and thus cause the possible abandonment of the *Allen* lawsuit and the non-institution of any suit challenging the Connecticut nearby differential. If the nearby differential was suspended during such litigation there would be no escrowing thereunder and hence no escrow fund from which to obtain compensation and reimbursement of expenses. Another reason for such attempted suspension was that the preliminary injunction in the *Allen* case was initially escrowing the entire nearby differential, monies that were attributable to the marketings of milk of not only non-nearby but also the nearby producers, and the *Allen* plaintiffs originally contemplated moving against the escrowed monies of nearby producer payments if they prevailed in their case. The suspension of the nearby differential would prevent such escrowing and thus effectively preclude such possible loss in damages to the nearby producers. Although the relevancy of such attempt to suspend the nearby differential to the solicitation and collusive aspects of this case is apparent, it should also be noted that the nearby producers were intially willing to give up the entire differential during this case and to thus allow each producer to obtain his full uniform milk price during this litigation – the ultimate objective of any *bona fide* suit to eliminate the nearby differential. However, after the preliminary injunction was entered by consent in this case to escrow only the monies emanating from the marketings of milk of non-nearby producers, the same nearby producers' counsel now claims that the CMPA nearby producers are "equitably" entitled to the escrowed monies of the non-nearby producers.

requested a judgment declaring the invalidity of the nearby differential provision of the order and an injunction against its future enforcement by the Secretary. The record discloses the filing of an amended complaint on March 2, 1967, for the purpose of adding three additional plaintiffs (Ottman, Mesick and Phillips), whose farms were zoned to render them eligible for the 23-cents nearby differential payments.[6]

On the same date, Chief Judge Foley granted a motion by three producers from the 46-cents nearby differential area for leave to intervene as defendants. There was no opposition to either motion.

On March 9, 1967, after hearing in the district court, the plaintiffs' motion for a preliminary injunction escrowing the contested nearby differential payments was granted by Judge Foley, and his Memorandum-Decision stated as follows:

> " • • • In effect, the challenge generally is the particular provisions of the order in issue are unauthorized by law and should be declared void and unenforceable. • • • Moneywise, a significant factor favoring the

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[6] The addition of such eligible "nearby" producers as plaintiffs was on the ground that they were ineligible for the 46-cents nearby differential payment of the order. Although these intermediate "nearby" producers were eligible for the 23-cents nearby differential under the Connecticut order, the Secretary had admitted that its existence actually caused these producers to lose 17-cents per hundred pounds of milk rather than gain the 23-cents provided for by the nearby differential provision. This admittedly inconsistent and arbitrary operation of the differential provision was independent ground for declaring it invalid but no such argument was made to the Court and Cranston's attorney added such "nearby" producers as plaintiffs.

> injunction is that the attorney for the intervening defendants, permitted by grant of formal motion to so intervene on March 2nd, unqualifiedly stated at the hearing on that date he would not have any objection to the signing of the preliminary injunction. Interestingly, it is these intervening defendants from whom the payments or credits will be withheld by the injunction order.
>
> Although the government earnestly argues distinguishability, I think there is enough similarity — at least upon the law and orders involved — with the *Blair* ruling adverse to the Secretary, from which certiorari was not sought, to satisfy the probable success requirement. Further, in *Allen et al. v. Freeman, Secretary of Agriculture of the U.S.*, Civ. Action No. 3379-66, United States District Judge Matthews recently signed a preliminary injunction in an action involving a milk order of this type regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area. * * *" (R. 115)

The docket in the district court discloses that a pre-trial conference took place on August 4, 1967, after notice to plaintiffs' attorney on August 2, 1967, but there is no indication that any pre-trial order was entered. (R. 906, A-N; T. 390, 5/27/68).

The record reflects that Judge Timbers took over the case on August 10, 1967 (R. 1161), the docket entries for said date stating that, "Trial moved by Plaintiffs' Attorney." The 4-page Transcript (R. 1161; A. 1) discloses

that all proceedings took place in chambers on this date, and that the Court stated that, "following an informal pre-trial conference attended by counsel for the respective parties, and pursuant to the agreement reached by counsel at the same pre-trial conference, the trial in the case on the merits commenced today at Albany that is the hearing on the claim for a permanent injunction and for a declaratory judgment, by agreement of all counsel, the evidence at this time to be received is limited to the administrative record which will be marked as a full exhibit, Defendant Freeman's Exhibit A in evidence." The trial was thereupon adjourned or continued to October 3, 1967 and subsequently to October 18, 1967 at 2:30 p.m., after agreement upon a schedule for filing and service of designations of the record on which respective counsel would rely.

The parties have contended that the trial commenced on August 10, 1967, rather than October 18, 1967, in opposing as untimely the attempts of various applicants to intervene in the action. However, the plaintiffs' attorney testified during a hearing on May 27, 1968 (R. 906; T. 390) that, "On August 7th, I was in Danbury, Connecticut, visiting a relative, and I went over from Danbury to Hartford and came up through Hartford on the 8th of August, and I conferred with Mr. Conard (defendant-interveners' counsel) in his office in Hartford, particularly with respect to the fact that I would not be able to go on with a trial of this case, if such were contemplated at this time, * * *."

On October 10, 1967, a motion for leave to intervene for the purpose of staying the *Cranston* case was filed by Russell Allen, *et al.*, appellees in the case involving the nearby differentials of the Massachusetts-Rhode Island

order that was pending before the U.S. Court of Appeals for the District of Columbia Circuit. Approximately 20 briefs had been filed in said case involving the same issue, including briefs by the attorney for the defendant-interveners in *Cranston*, the States of Connecticut, Vermont and Massachusetts, and the respective parties. In view of the contentions in such briefs concerning the interrelationship of the Connecticut, Massachusetts-Rhode Island, and New York-New Jersey milk orders, the need for uniformity espoused by defendant's and interveners' attorneys, the "chaotic" disorderly marketing conditions that would result from non-uniformity of treatment, etc., the *Allen* applicants alternatively moved for transfer of the *Cranston* case to the U.S. District Court for the District of Columbia.

The *Allen* applicants maintained that principles of sound judicial administration, judicial comity and abstention, and the benefits flowing to the court and parties from a decision on a fully briefed appeal warranted the stay or transfer of the *Cranston* case. The hearing of March 2, 1967, on the motion for preliminary injunction indicates that the court's calendar was crowded in the Northern District, and the presiding judge stated on October 18, 1967, that in order for him to sit in that District, "it has been necessary for me to bring into my district in the District of Connecticut, a Court of Appeals judge to sit in that court, a District Judge from out of the District." (R. 1162, p. 42, 10/18/67). Nevertheless, the parties vehemently opposed said motion, and it was denied on October 18, 1967, on the grounds, among others, that it was untimely, that the trial had commenced on August 10, 1967, and that the applicants did not have an interest justifying intervention.

As a courtesy to the Court, the *Allen* applicants did not specify a return day for their motion but they did request that the Court set the motion for hearing on a date sufficiently in advance of the trial to enable applicants to pursue any appropriate appellate relief. The district court advised that said motion would be heard immediately prior to resumption of the trial at 2:30 p.m. on October 18, 1967. The record of said hearing reflects that the presiding judge stated that, "I think, probably, the issues in connection with that motion might be heard and *determined* promptly, before we go any further. * * * ." The transcript then discloses the following at page 6 (R. 1162):

> "THE COURT: I will, however, be glad to hear any other counsel on the motion to intervene, if counsel wishes to be heard.
>
> MRS. FRIEDMAN: I would just like to say a few words for the government. I would like to summarize our position very briefly.
>
> THE COURT: I would be glad to hear you.
>
> MRS. FRIEDMAN: First, *as you pointed out*, the applicants for intervention in this action, Mr. Ryan's clients, have absolutely no interest in this lawsuit whatsoever. * * *."

The transcript of the aforesaid hearing fails to reflect any such statement by Judge Timbers theretofore in said hearing, but it also discloses that the court distributed a prepared 8-page Memorandum Decision denying the motion of Russell Allen, *et al.*, as aforesaid at the conclusion of the hearing on the motion.

Counsel for the *Allen* applicants had also advised that he desired to enter an appearance in the *Cranston* case for a non-nearby farmer, and he also advised that the expedited briefing schedule in the *Allen* appeals precluded adequate preparation for any participation in *Cranston* if trial commenced on October 18, 1967. He was advised by the law clerk of the presiding judge that the court was not disposed to the granting of a continuance, and no further action was taken by the court in this connection. The inability to obtain such continuance indicated that the trial would commence as scheduled and that the *Allen* motion to transfer or stay the action would be denied.

On October 18, 1967, when it was apparent that no other dairy farmer would be able to participate in the *Cranston* case, a suit was filed by George H. and Kenneth H. Herrington, against the Secretary of Agriculture in the U.S. District Court for the District of Columbia under a different statutory basis than the *Cranston* complaint and consituting different causes of action. The *Herringtons* marketed their milk under the Connecticut order, and the differential provision's operation caused them to lose from $5,000 to $6,000 annually in order to award a monthly differential payment of $12.50 to the average Connecticut nearby producer. They were of the opinion that they were entitled to summary judgment and/or mandamus against the Secretary, this relief not being sought in *Cranston* even after the Cranston plaintiffs were furnished with a prepared motion for summary judgment.

Thereafter, the district court allowed the filing of a second amended complaint in *Cranston* containing entirely new causes of action set forth in the *Herrington*

case and which proceeded under completely different statutory provisions than the first two *Cranston* complaints. Additionally, motions by the plaintiffs and defendant-interveners to maintain and defend the suit as a class action were thereafter filed and ruled upon by the district court. The fact that said motions were entertained almost nine months after commencement of the suit on February 9, 1967, did not render such motions untimely. (R. 230, 262)

Thereafter, the district court also entertained extensive testimony and voluminous exhibits relating to the Massachusetts-Rhode Island order and its predecessor milk orders, including the very administrative hearing records that had been ruled on by the U.S. District Court for the District of Columbia in the *Allen* case and which were then before the U.S. Court of Appeals for the District of Columbia Circuit.

In spite of such testimony and exhibits concerning the Massachusetts-Rhode Island milk order and its predecessor milk orders, the trial transcript discloses that the presiding judge adopted the contentions of the defendant and interveners that the respective milk orders were different and that *Blair* and *Allen* were distinguishable.[7] (R. 1162, pp. 488-90).

The district court found it necessary, however, to consider and rule on testimony and exhibits concerning such

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[7] After maintaining in this case that *Blair* and *Allen* were distinguishable, the milk orders different, the administrative hearing records separate and distinct, etc., counsel for defendant and associated counsel of interveners then rushed to the U.S. Court of Appeals for the District of Columbia Circuit to urge reversal of the *Allen* case on the basis of the *Cranston* district court decision.

distinct milk orders and hearing records in arriving at its decision which it acknowledged was at variance with *Blair* and *Allen*. It actually upheld the Boston order involved in *Allen*.

The second amended complaint in *Cranston* that contained the same statutory basis and causes of action as the *Herrington* complaint was not filed until October 19, 1967, on which date the defendant withdrew his opposition to the *Cranston* motion for leave to file the second amended complaint. The motion in *Cranston* for leave to maintain the suit as a class action was not granted until October 20, 1967, the defendant again withdrawing his opposition[8] after plaintiffs' counsel requested a ruling on such motion on the third day of the resumed trial. (R. 1164; pp. 299-301)

The parties made no mention of the *Herrington* case, nor did they take any action to cause its transfer and consolidation with the *Cranston* suit. The Herringtons, moreover, were of the opinion that the *Cranston* suit would be dismissed, due to certain information provided by the plaintiff Cranston. The Herringtons took no action in their case until the defendant moved to dismiss *Herrington*, although they could have moved for judgment after 20 days. Defendant waited almost 50 days

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[8] Defendant insisted in *Allen v. Freeman* that a hearing should be held on the class action question at the earliest possible time, that 6,600 dairy farmers in various states were indispensable parties, and that they should all be notified before proceeding further. In the *Blair v. Freeman* supplementary proceedings, defendant demanded that 35,000 producers be notified thereof. Defendant vehemently contested matters that had previously been admitted, and there were no consents of any nature, other than those emanating from the plaintiffs therein.

from October 18, 1967, before moving to dismiss and then contended that the Herringtons were in the plaintiffs' class in *Cranston* and could "participate" in that concluded case.

The *Herrington* plaintiffs then filed a motion for summary judgment and/or mandamus, and their attorney was thereafter served with a "Notice of Motion" that advised that defendant would move the court the following morning for an order authorizing a delay in answering plaintiffs' motion until 20 days after the defendant's motion to dismiss had been ruled upon. Since the Notice of Motion was served in the late afternoon during counsel's absence from the office and he had other committments for the next morning, he advised the short motion's court and the office of defendant's counsel that he would not appear at the time noted in the Notice but would do so the next morning. The short motion's court would not hear defendant's motion under such circumstances, particularly since it was to be brought up as a preliminary matter and was not of an emergency nature. (R. 2423-83; Transcript, pp. 3-10, 1/8/68).

Instead of proceeding in the proper motion's court or waiting until the next morning when the Herringtons would oppose the motion, the defendant's attorney in *Cranston* proceeded in long motion's court in the *Herrington* case before a different judge and represented, in effect, that the motion was unopposed. The long motion's judge even inquired as to why counsel proceeded in his court on a preliminary matter, and he thereafter stated that he would not have signed defendant's proffered Order if he had known that the *Herrington* counsel desired to oppose such relief.

Further, in obtaining such order to delay the *Herrington* motion for summary judgment, defendant's counsel advised the U.S. District Court for the District of Columbia on December 20, 1967, that the Herringtons could participate in the *Cranston* case, although the *Cranston* counsel was well awate that the trial had been concluded on October 27, 1967, almost two months previously:

> "The plaintiffs, who brought the suit here, if they would seek to do so under Rule 23 in our view, would be entitled to participate in that litigation. They have, however, come into this court seeking independent relief in this jurisdiction. Certain other people tried to intervene and were rejected, and apparently counsel raises some question that that denial applies to these particular plaintiffs. We believe they do not. • • •

It is noted that defendant and interveners thereafter opposed a subsequent attempt to reopen or participate in *Cranston* by petitioners.

After the filing of a motion to vacate (R. 2475), the Chief Judge directed defendant's counsel to appear before him the next morning. The Court had requested a transcript of the proceedings before the long motion's court, noted that such application took about 3 minutes, and admonished the defendant's counsel. The Court then vacated the said Order, including a scheduled hearing on the defendant's Secretary's motion to dismiss, and it directed the defendant to answer the *Herrington* motion for summary judgment. Defendant's counsel in the *Cranston* case pleaded the pendency of the *Cranston* case in the Northern District of New York but the Chief Judge for

the District of Columbia exercised his discretion in ordering the defendant to answer the motion for summary judgment. Although defendant's counsel represented to the long motion's court on the previous day that defendant was desirous of a hearing on its own motion without undue delay, it was represented to short motion's court that 60 days was necessary for defendant to answer the *Herrington* motion for summary judgment. The defendant was granted a 30-day extension for the filing of such answer.

After failing to dismiss or stop the *Herrington* case and motion for summary judgment, the defendant then proceeded through the defendant-interveners in *Cranston*, who applied to that court for a temporary restraining order (R. 292) that would force the Herringtons and their attorney to withdraw the motion for summary judgment in order that defendant might avoid answering the same. Such application was made in chambers at New Haven, Conn., and also requested that the Herringtons and their attorney be required to move to suspend all proceedings in the *Herrington* case.

The restraining order was granted on December 29, 1967, and a hearing was scheduled at Syracuse, N.Y., on January 8, 1968 for a preliminary injunction. Prior to service of the restraining order, the Herringtons filed a Notice of taking of depositions, including that of defendant-interveners' attorney who had applied for the restraining order that would compel the suspension of proceedings in *Herrington, including the taking of his deposition.* Defendant in *Herrington* moved to vacate the Notice of taking of depositions, citing the *Cranston* retraining order, and the Herringtons filed opposition thereto on January 9, 1968, having theretofore filed an

answer to the motion for preliminary injunction in the *Cranston* case. The *Herrington* attorney did not even know if he could appear in the Northern District of New York, for the defendant-interveners' counsel in *Cranston* contended that the said restraining order had been violated *by virtue of the filing of opposition to defendant's motion to vacate the Notice of taking of depositions in Herrington.* Such opposition had been filed on January 9, 1968, more than 10 days after the issuance of the restraining order and prior to notice of the extension thereof, but the preliminary injunction was thereafter issued on January 16, 1968. It ordered the withdrawal of the *Herrington* motion for summary judgment by January 19th, *one day before the defendant was required to file his answer thereto,* and it also ordered the plaintiff *Cranston* and his attorney to take such action in the *Herrington* case if Herrington and his attorney failed to do so. Under the circumstances and in view of the fact that the Herringtons could ill afford either fine or jail, the Herringtons involuntarily complied with the *Cranston* injunction that overruled the specific order of the Chief Judge of the U.S. District Court for the District of Columbia.[9]

In respect to the motion for preliminary injunction, to which Herrington had submitted written opposition[10]

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[9] Such motions to withdraw and suspend would presumably have been filed by the *Cranston* plaintiffs through defendant's or interveners' associated counsel who were stationed in the clerk's office on January 19, 1968.

[10] Although the *Herrington* answer to the motion for preliminary injunction had informed the *Cranston* court of the need for depositions and had requested the *Cranston* court to investigate such matters if they were prevented from doing so, the Court made no inquiry whatsoever in this connection.

(R. 558), the Court stated as follows:

> "The Court is going to grant the motion for a preliminary injunction, without giving detailed reasons for it. A clear showing has been made for the relief therein sought, and the motion, accordingly, is granted." (R. 1169; p. 24)

Counsel for defendant-interveners also prepared the preliminary injunction and order that was signed by the district court on January 16, 1968, the temporary restraining order being extended on January 8, 1968 for another 10 days by endorsement on the margin and without enumeration of any reasons therefor. (R. 390) Appeals were noted from said orders but the Clerk informed that he was unable to take any action thereon because the file was in the possession of the presiding judge in New Haven, Conn. (R. 282) Counsel believed that the record would be returned in sufficient time for the transmittal thereof to the Court of Appeals, and he thereafter applied for an extension of time for the filing and docketing of the record on appeal. This motion was denied as untimely, being received one day late, and the court's order stated that such appellants did not raise any substantial questions as to the correctness of said orders from which appeals were noted. Said Order of April 5, 1968, further stated that appellant Duncan was a member of the plaintiffs' class and was "adequately represented by the plaintiff's". (R. 585, 670, 695)

On March 26, 1968, prior to the aforesaid Order of April 5, 1968 denying an extension of time for docketing and filing of the record for said appeals, Leonard Duncan, *et al.*, non-nearby dairy farmers who reside near Troy, N.Y., and market their milk under the Connecticut

order, sought to intervene in the district court under Rule 24, FRCP, or to otherwise enter the action under Rule 23, FRCP, relating to class actions. They questioned the adequacy of representation of the plaintiff's class and raised issues as to the collusive nature of the suit in seeking discovery and depositions or dismissal of the suit with protection of the escrow fund. Sixteen other non-nearby dairy farmers who had requested the district court to grant such relief joined in the appeals from the lower court's orders and judgment denying such relief, and over 40 joined in this petition to this Court. The Duncan motion requested the Court to enter the dismissal of the suit if certain charges concerning the solicitation of the case, collusion, etc., were not denied, in that the parties had failed to deny the same on at least three prior occasions.

In spite of the pendency of said motion, the aforesaid Order of April 5, 1968 stated that plaintiffs were adequately representing their class, and the parties failed to file any response to Duncan's motion within the required period or otherwise. After supplementing the pleading attached to the motion to intervene with various affidavits (R. 731; 848, 850, 857, 859, 861), and after submitting a proposed Order (R. 796) when no response was filed thereto, the petitioners filed a motion for summary judgment. (R. 798) Opposition was then filed by the parties from 40 to 45 days after the filing of said motion for intervention and attached pleading or motion to dismiss, but the Court failed to even rule on any of the petitioners' aforesaid motions.

On April 22, 1968, however, the district court issued an order upon unidentified "requests" of the parties' attorneys to provide for the mailing of Notices concerning

the action to about 2,100 producers by April 24, 1968. The Order directed the Market Administrator in Hartford, Conn., to furnish the names and addresses of producers to counsel for plaintiffs and interveners, but not to the petitioners or their counsel, although it is difficult to perceive how such names and addresses could be furnished to counsel located in Troy, N.Y., by said date and particularly when the Court issuing the Order was sitting in the Southern District of New York on April 22, 1968.

The said Notice advised dairy farmers for the first time of a suit that had been filed 15 months previously and of a trial that had been concluded 6 months prior to the notice. Although the decision in *Eisen v. Carlisle & Jacquelin*, 319 F.2d 555, was cited as the basis for the Order, it is clear that the posture of the suit precluded any participation therein by the non-nearby producers. The notice was also a show cause order that directed any dairy farmer who questioned the adequacy of representation to advise the Court, the U.S. Attorney, and the respective attorneys for the parties of such fact in writing on or before May 9, 1968, and to appear on May 15, 1968, at Albany, N.Y., "to show cause as to the precise manner in which their interests are or may be different from others similarly situated or in which their interests are not being fairly and adequately represented by existing counsel." The Notice further stated that any such dairy farmer "should be prepared to submit probative evidence or testimony under oath at the hearing, subject to cross-examination, to support his claim." The Notice advised that, "To facilitate a full and ample opportunity for all recipients of this notice who so desire, to familiarize themselves with the proceedings to date, the complete record of those proceedings *has*

been deposited in the chambers of the United States District Judge, located in the Federal Building, Albany, New York. This record *is* available for public inspection during normal business hours."

The Notice informed that the farmers desiring to question the adequacy of the representation could present only such witnesses as the district court might determine to be required, the names of such witnesses to be furnished and good cause demonstrated for their presence subject to objection thereto by any interested party. The Notice further informed that the plaintiff Cranston and counsel for the parties would be present for questioning by the court or by counsel for good cause shown, but it failed to inform that petitioners would have to make the parties and counsel the petitioners' witnesses if they desired to examine them.

The petitioners advised that they needed to take depositions and obtain discovery in order to prepare for said hearing and that some witnesses were not subject to the court's jurisdiction. They filed extensive objections to the contemplated procedure and hearing, termed an "alternative" to discovery and depositions by the parties, and their subsequent involuntary participation in the hearings was under objection and without waiver of any rights or relief previously requested by them (R. 888, 906)

Further, the Order of the lower court of April 22, 1968, stated that the entire record was then at Albany and available for review as of that date. Petitioners' counsel traveled 800 miles round-trip to examine said record on May 1, 1968, but the record had never been sent to Albany. He again traveled to Albany a second time for said purpose, but he was able to review the

record only after persistent inquiry and then only for 25 minutes because of the unavailability of an Ass't U.S. Attorney to watch as the record was being examined. In spite of such admitted facts, the district court's decision attempts to excuse this inaccuracy in its Order by maintaining that the court "is completely satisfied that all who desired to examine the record were aware of its availability after May 9, 1968 and had ample opportunity to study it. No prejudice resulted from the delay." Much of the record was never even entered on the docket until after the District Court's decision of August 2, 1968.

Although petitioners' counsel made several inquiries concerning the location of the record, he was never advised when the record was finally sent to Albany. He ascertained this during the hearing on May 15, 1968, and it is clear that there was no real opportunity to review the record for said hearing. The first date that the record was allegedly available for review was May 10, 1968, a Friday, and counsel could not travel to Albany on said date and have any time to review the record. The record was supposedly available on only May 13 and 14, 1968, and petitioners' counsel was never advised of its availability on those dates, being advised of its location during the hearing of May 15, 1968, and thereafter being denied opportunity to examine the same except for 20-25 minutes when he again traveled 800 miles to review said record to prepare for the second collusion hearing on May 27, 1968, the last collusion hearing being held on June 10, 1968, under the District Court's unusual procedure.

At least 90 percent of those farmers in the locality of the suit who were aware of the same requested the

district court to dismiss the action. Farmers in other localities who did not know the plaintiffs or their counsel would surely have joined in such requests if the relevant facts had been furnished to them. The farmers had to proceed by word of mouth in the immediate area, and a meeting prior to the hearing by unselected and unsolicited non-nearby dairy farmers was condemend as a "rump group" by plaintiff and his counsel, who never informed such farmers of the pendency of the suit or the other matters relevant to its maintenance as a class action.

Petitioners were limited to direct examination at the hearings if they wished to question a party or his counsel, and the counsel could even examine his own client thereafter by leading questions to establish that which was desired. The Court asked no questions of the parties or their counsel and did not even require Attorney Conard to submit a statement, let alone testify, although the Court did examine a dairy farmer in an ineffective attempt to question his testimony that he had never met or communicated with the named plaintiffs' attorney and did not know that he had been listed for 15 months as a named plaintiff representing a class of dairy farmers who were unaware of the pendency of such suit wherein the trial had been concluded 6 months previously.

The district court entered orders by margin endorsement on August 2, 1968, date of its judgment, denying the motion to intervene or to otherwise enter the action, the taking of discovery and depositions, dismissal of the suit, and petitioners' motion for summary judgment. It entered judgment for the Secretary and defendant-interveners on the merits, dismissing the named plaintiffs' Complaint and holding that the nearby differentials were

authorized by the Act; that they were not trade barriers or illegally discriminatory, and that the promulgation thereof was supported by substantial evidence in the administrative record. The district court's judgment of August 2, 1968, also reaffirmed the class action orders that had allowed the individual plaintiffs and defendant-interveners to represent other dairy farmers similarly situated.

Upon entry of the District Court's judgment and decision of August 2, 1968, in the *Cranston* case, the associate counsel of Attorney Conard in the *Allen* case and the Secretary's attorneys filed said decision in the U.S. Court of Appeals for the District of Columbia Circuit in the pending *Allen* case and contended that the "trial" and decision in *Cranston* should cause the reversal of the District Court's *Allen* judgment by the Court of Appeals for the District of Columbia. However, that Court affirmed the lower court's judgment in *Allen* and indicated in its decision of September 23, 1968, its disagreement with the *Cranston* District Court decision.

The parties in *Cranston* thereupon delayed the filing of the joint appendix and the plaintiff-appellants' brief in the Second Circuit for approximately a year; thus preserving a conflict which might otherwise have been eliminated if the parties had proceeded in normal course and if the Second Circuit had reversed the District Court. Attorney Conard and his associates in the *Allen* case and the Secretary's counsel urged the granting of their respective petitions for a writ of certiorari in respect to *Allen* on the basis of the aforesaid conflict with the *Cranston* decision and this Court did grant such writ. 394 U.S. 958.

The parties in *Cranston* thereafter sought expedited argument in the Second Circuit, and its decision was held in abeyance pending this Court's decision in *Zuber v. Allen*. However, these petitioners were not allowed any oral argument whatsoever on the appeals they prosecuted in *Cranston* and which had been consolidated with the appeals of the named plaintiffs in *Cranston* with provision for the issuance of a single mandate in Nos. 32793-796, the named plaintiffs' appeals, and Nos. 32797-799, the appeals of petitioners from the orders of the District Court.

After issuance of this Court's decision in *Zuber v. Allen* on December 9, 1969, the parties and the petitioners filed numerous memoranda in the Court of Appeals in *Cranston* in respect to the applicability of the *Zuber v. Allen* decision to the *Cranston* case. The Secretary and defendant-interveners were finally forced by petitioners' memoranda to admit that this Court's decision applied and required reversal of the District Court's decision, and the Secretary further admitted that the nearby differential would have to be terminated and the escrowing stopped thereunder. He acknowledged on April 1, 1970, after consideration of various proposals for continuing the nearby differential on a different basis, that none of such proposals were appropriate subjects for an administrative hearing and that, "In the circumstances, any request for continued escrowing would serve no useful purpose, and therefore the Secretary withdraws the previous request for continued escrowing". (Supplemental Memorandum of Secretary, 4/1/70, p. 2).

On April 26, 1970, however, the nearby producers sought further delay and continuation of the escrowing in contending that the nearby differentials should be

"phased out" over a minimum one-year period, the contention apparently being that the illegal nearby differential would gradually become less illegal as the exactions were made in successfully lesser amounts from petitioners and other non-nearby producers.[11]

On July 16, 1970, the Second Circuit issued its judgment and per curiam decision based solely on this

[11] That contention is again being made in the Court of Appeals by counsel for both the named plaintiffs, who rarely disputed Attorney Conard's proposals unless forced to do so by the filings of these petitioners, and the said attorney for the nearby producers, and they jointly proposed such a judgment to the District Court in the usual private proceedings herein. In stating that the non-nearby producers would receive "the entire escrow fund" after deduction of attorneys' fees and expenses or an amount "in excess of $500,000", the nearby producers' counsel who was paid for his services in losing the case asserts the qualification that, "This assumes that total counsel fees awarded will amount to less than $500,000." (Motion For Supplementation of this Court's Decision of July 16, 1970", pg. 13, ftnt. 3, 11/5/70). Counsel for the named plaintiffs and the defendant-interveners neglect to advise that the amount disbursed to the non-nearby producers under their poposal would be eaten up through continuation of the nearby differential over an extended period (and further extensions thereafter on one pretext or another without opposition), and that the claimed entry of additional milk from new non-nearby producers would result in larger nearby differential payments than heretofore under such new differential, even at reduced rates, and would also cause such non-nearby producers to bear the burden of any surplus caused by an influx of milk of additional non-nearby producers. They also fail to advise that such milk supplies can be largely regulated and manipulated by the Connecticut Milk Producers Association composed almost entirely of nearby producers and by the sanitary health regulations of Connecticut for the benefit of nearby producers.

Court's decision in *Zuber v. Allen* and concluded as follows:

> "In view of the Zuber decision, the judgment below is reversed and the case remanded to the District Court for such proceedings, including the proper disposition of funds held in escrow during the proceedings and costs and related matters, and the entry of judgment thereon as may be appropriate in the light of *Zuber*."

On August 5, 1970, the District Court entered an Order restraining the Secretary from terminating the nearby differential pending a hearing on the motion of Attorney Conard to "phase out" the nearby differential as aforesaid. Docket entries of the District Court disclose that a "Pre-Trial Conference (1½ hr.)" was held on August 25, 1970, and the hearing on said motion was continued from September 10, 1970 to September 23, 1970. Upon discovery that petitioners' dairy farmer representative and one of their counsel had ascertained the existence of such hearing and were in the courtroom, the parties thereupon succeeded in removing the hearing to chambers, and both petitioners' representative and counsel were denied permission to sit in on said hearing. However, they later ascertained that action on said motion was continued to October 14, 1970, the last day for petitioners to seek a writ of certiorari from this Court concerning the matters complained of in the *Cranston* case.

On October 8, 1970, however, the Honorable Mr. Justice Harlan of this Court granted the motion of these petitioners for an extension of time for filing such petition until December 12, 1970. Upon being apprised

thereof, the parties then filed dual motions for supplementation of the decision of the Second Circuit, and further delaying tactics are being pursued in that Court in order to continue to build up the escrow fund through continued escrowing for the primary benefit of the parties' attorneys and in the hope that these petitioners will be judicially excluded from this case by denial of their petition for a writ of certiorari in the interim.

Although the Secretary has recently filed a memorandum in the Court of Appeals following the petitioners' arguments that the District Court has no jurisdiction to act in the administrator's stead in rewriting and extending an illegal administrative regulation, we are of the respectful view that the Secretary may not have taken such position if petitioners had not pursued their rights and that the transcript of the last hearing in the District Court discloses that the Government was straddling the fence in this connection in purporting to contend that the District Court had no jurisdiction as aforesaid but also to indicate that it otherwise favored such proposed judgment and was undecided concerning an appeal even if the District Court ruled that it could rewrite and extend the illegal nearby differential. It is clear, however, that the Government would not oppose the attorneys' fees or lack of notice to dairy farmers in respect thereto except after the fact and that the petitioning dairy farmers remain the roadblock in this litigation in which the counsel for the named plaintiffs and defendant-interveners claim petitioners are not parties and not entitled to be heard, served with any pleadings, or notified of the private proceedings affecting their interests.

QUESTIONS PRESENTED

1. Whether this suit could be maintained as a class action or otherwise when the record conclusively shows that the plaintiff Cranston was admittedly solicited to bring this suit after another farmer was thrice approached by the opposition for such purpose but not recontacted when he indicated that he desired to consult his own attorney rather than have one appointed for him; was not allowed to contact his present attorney until after he was "checked out" by the opposing counsel for the nearby producers and the Connecticut Milk Producers composed almost entirely of nearby producers; was transported by such opposing counsel and a nearby producer to the office of his present counsel for his first meeting therewith concerning institution of this suit, the attorney initially recommended for plaintiff by opposing counsel having served as associate counsel for the nearby producers in this suit; admittedly did not notify any producers other than the named plaintiffs of the suit either prior or subsequent to the trial thereof, two of said named plaintiffs not knowing that they had been listed as named plaintiffs for 15 months and one having testified that he had never met or communicated with plaintiffs' attorney, the latter admitting the same; retired from dairy farming prior to the District Court's decision without informing the Court of the same; was not liable for any attorney fee or expenses of this case, in that the named plaintiffs' attorney was to be paid a reasonable fee if plaintiffs lost this case, the CMPA admittedly having maintained this suit in the names of the three defendant nearby producers and having done so in the case of *Zuber v. Allen*, 396 U.S. 168, without any such financial arrangement with plaintiffs' counsel in that case wherein it resorted to numerous unfair and improper tactics to prevent adequacy of representation of non-nearby producers, including improper tactics to financially

prejudice the presentation of the non-nearby producers' case therein.

2. Whether the petitioners were denied adequacy of representation and due process of law by virtue of the aforesaid action and others during the litigation, including but not limited to refusal to rule on petitioners' motions or to allow them to take depositions and discovery and actually enjoining petitioners therefrom when petitioners sought to question the validity of this suit.

3. Whether counsel for the private opposing parties, both of whom lost this case, the decision of the District Court being reversed solely on the basis of this Court's decision in *Zuber v. Allen* in a Per Curiam opinion, are eligible to seek any compensation from the escrow fund in this case in view of the factors herein bearing on its validity, and also when the attorney for the nearby producers and CMPA was paid by the latter for his services herein and the attorney for the named plaintiffs was guaranteed a reasonable fee and expenses by the CMPA as a volunteer, or whether the escrow fund should be disbursed to petitioners and other non-nearby dairy farmers without such deductions either at the direction of this Court or under the case of *Herrington v. Freeman*, C.A. No. 2861-67, pending in the U.S. District Court for the District of Columbia, with expenses and fee for these petitioners therefrom.

4. Whether the admittedly illegal nearby differential may be rewritten, enlarged and continued for at least another year after repeatedly frivolous delays under a jointly proposed judgment of counsel for the nearby and non-nearby parties in private proceedings in the District Court and under which those attorneys would obtain a minimum of $500,000 or about 50% of the escrow fund for alleged services in this suit which rendered the *Zuber*

v. Allen case much more difficult for the plaintiff nonnearby producers therein and thus for these petitioners to prevail herein.

REASONS FOR GRANTING THE WRIT

1. This case should not only warrant the attention of this Court because of the need for rectifying a gross departure by the District Court from the accepted and usual course of judicial proceedings and the sanction of such departure by the Court of Appeals, presumably because it reversed the District Court on the merits and thus gave little consideration to the collusive and other disabling aspects of this suit, but also because the failure to act in respect to this particular case would constitute an open invitation to the institution of similar collusive suits in the future involving large issues or even governmental programs and would thus effectively prevent the average citizen from filing, maintaining and controlling an independent *bona fide* suit in the exercise of and for the protection of his constitutional rights. The failure to grant this petition would not only cause such citizens to feel that it would be fruitless to attempt to assert or protect their basic rights but would also encourage those who have denied those rights to continue to do so in the future with impunity and with the realization that they might even be financially enriched through denial of another's right to elementary due process and fair play. In this connection, the Court need but note that the failure of the lower court to take any action in regard to the gross improprieties that permeate the institution and maintenance of this suit has resulted in the present joint efforts of supposedly opposing counsel to rewrite and extend an administrative regulation which they admit is illegal and also to enrich themselves in the process through continued escrowing and the private seizure of approximately $500,000 or about 50% of the escrow

fund for losing performances in a suit which was clearly collusive as a matter of law and otherwise and intended to affect the disposition of *Zuber v. Allen*, 396 U.S. 168, and its multi-million dollar escrow fund through replacement of relevant administrative records by the inaccurate testimony of interested witnesses in an otherwise unnecessary alleged trial in the District Court. Even now the parties propose another "limited trial" in the District Court for the purpose of continuing and rewriting an admittedly illegal nearby differential on the basis of testimony of the same interested witnesses. Such result is further demonstrated by the open assertions of the parties that intentional frivolous delay to postpone their proposed disposition of the escrow fund and a decision by the District Court in regard to rewriting and continuation of the nearby differential will prevent this Court from granting this petition, and it is also shown by the ready admissions of the parties that they will employ inconsistent swiftness in the District Court to disburse the escrow fund to the involved private attorneys upon the granting of certiorari to moot this aspect of the case in this Court.

2. This case presents an unusual opportunity to this Court to enable the average citizen to reaffirm his faith in our courts and judicial system under which the rights of such citizens are equal to those of any organization, particularly in class actions affecting thousands of individuals and a vast part of the country, and not subject to political or other influences as in administrative proceedings in some instances. It is one of the few cases involving a segment of our economic life whose labor and devotion to small individual enterprise are readily recognized and who have always sought to protect and preserve the principles upon which this Court functions. Although not allowed even oral argument in the lower court and grossly handicapped by the unusual rulings and actions of the District Court, the petitioners are of

the respectful opinion that a mere reading of the limited testimony set forth in Appendix A hereto will disclose that this suit is clearly collusive under the holding of this Court in *Gardner v. Goodyear*, 131 U.S. Appendix ciii, the pertinent part thereof being found at page 41 of this petition. This case could also be utilized by this Court to indicate to both the bar and the government that the standards set forth in that case have not been eroded by time or otherwise and that this Court expects the same fair and proper conduct from the members of the bar and the government, the presence of the latter in this suit maximizing rather than minimizing the improprieties therein.

3. The parties below, although admitting the applicability of this Court's decision in *Zuber v. Allen*, 396 U.S. 168, and the illegality of the nearby differential, are seeking to avoid the same through a misrepresentation of that decision, particularly in respect to the parts thereof which noted that neither the administrator nor the court could act in the other's stead and that the nearby differential should be deleted rather than enlarged and continued. The holding of this Court is also pertinent in regard to the present joint actions of the parties' counsel who have repeatedly sought in every conceivable procedural manner to continue the escrowing under an illegal differential for their own primary financial benefit, in that this Court's decision concluded as follows:

> "Less losing parties be encouraged to prolong litigation by frivolous appeals in order to reap a windfall, we think respondents deserve the fruits of their victory as of the date of final judgment at trial."

In the present case, the monies escrowed were solely those of the non-nearby petitioners, amounting to about

44-cents per hundred pounds of milk marketed in Connecticut, and the escrow order was entered by consent, the nearby producers admitting that the minimal amount of 2-cents per cwt. they received from the nearby differential was too insignificant to really affect their milk price, and the disbursement of the escrow fund to non-nearby producers is dictated by many other factors not present in *Zuber v. Allen*.

ARGUMENT

This suit is collusive as a matter of law because of the fact that payment of expenses and fees of plaintiffs' counsel was to be made by the opposition if the plaintiffs lost the suit. It is obvious that delayed payment only increases the control inherent in the situation to the very conclusion of the case. The lower court's opinion fails to mention the leading case of *Gardner v. Goodyear Dental Vulcanite Co.*, 131 U.S. Appendix ciii, which held that a suit was collusive as a matter of law even where the involved attorneys did not know that payment of their respective fees emanated from the same party. The *Cranston* opinion stresses the lack of control over the plaintiffs' case, but this Court has rejected both the "control" criterion and the "reimbursement" theory relied upon by the lower court. There can be no reimbursement of the plaintiffs in any event when they are admittedly not responsible for any expenses or fees and have no agreement of any nature with their attorney in this regard. This Court clearly stated the applicable rule in the *Goodyear* case:

> "The company, however, paid the counsel employed for the defense as well as for themselves in the Circuit Court and subsequently in this Court. These facts appear from the record and the admissions of the company, in the 9th Article of their Answer to the motion to dismiss the appeal. *They are the only facts which we think it necessary to notice.*
>
> It may be that the company has *not* become the legal or equitable owners of the

> opposing interests involved in the suit. There may be, *and doubtless are*, large opposing interests, *of which they are neither the legal or equitable owners*. But it cannot be admitted that one party to a suit can pay the fees of counsel on both sides, both in the court below and on appeal, *without being held* to have such control over both the preparation and argument of the cause, *as to make the suit merely collusive* in both courts.
>
> *It can make no difference* that the counsel fees were charged to the party apparently, *though not really*, liable to pay them, *and payment of the other party procured through him. This, indeed, is a circumstance against the party who pays the fees, rather than in his favor.*"

In support of their citation of the *Goodyear* case and the clear command of the Supreme Court therein, the petitioners set forth the statement of the counsel in *Goodyear* in responding to the motion to dismiss that suit on appeal, that suit being far less violative of the rights of those involved therein than of the petitioners in this suit:

> "The counsel who signed the answer to this motion, made a most careful and conscientious examination of the facts before the answer was drawn. They believed then, and they believe now, that the statements contained in it are exactly true, and that they are susceptible of the amplest proof.

They now learn that the fact, stated in the 9th clause of that answer, that during the latter part of the preparation and the argument of the cause the counsel for the defendant were paid by the Complainant seems to the Court, of itself, sufficient ground for the dismissal of the appeal.

It was the opinion of the Counsel, in submitting the answer, that if the integrity, fair dealing, complete preparation of the defense and entire absence of collusion were made to "appear in proof, as alleged in the said 9th clause; the motion to dismiss the appeal should be denied, notwithstanding the payment of Counsel which the Court seems to disapprove.

But they think that the question presented is not one which they ought to argue. It is a question of propriety and good practice; and upon such a question whatever may be their own opinion, they do not think it becoming in them as Officers of this Court to advise it. It is enough for them to know that the Court doubts.

Under such circumstances while they deeply regret that by this disposition of the case, the refutation upon the record of the charges made against counsel will become impossible, they do not think it proper to contest with the Court the dismissal of the appeal.

> They therefore waive the fact that the motion is promoted by the same persons who, with full knowledge of all the facts, aided in promoting the appeal, and the further fact that the appeal was determined at a term of the Court now past, and, with full confidence that, when a cause based on the same patent comes here again, the integrity of the present record will be completely vindicated, they submit the question of dismissal to the judgment of the Court without argument."

The petitioners respectfully submit that the door to fraud is opened wide when the *opposition* solicits the case and the plaintiffs, approves opposing counsel, and offers to pay the fees and expenses of opposing counsel if the case is lost. The record reveals that CMPA officials and attorneys with financial interests in this suit committed the aforesaid acts, and the action of such CMPA officials and attorneys in *Blair* and *Allen* discloses that they attempted to preclude any representation of its non-nearby members' position in that litigation.

The petitioners respectfully submit that the record below is abundantly clear that the solicitation of this suit by the Connecticut attorneys and "nearby" interests involved in the *Blair* and *Allen* cases took place shortly after January 11, 1967, when Judge Matthews granted the preliminary injunction in *Allen*, the same being entered on January 16, 1967.

The witness Alexander Marbot testified that he was solicited to bring this suit in the District of Connecticut

on three different days within a period of one week prior to January 27, 1967, the date on which plaintiff Cranston was contacted for the same purpose after Mr. Marbot expressed doubt concerning the true motives of the CMPA intermediary (Blakely) and advised that he desired to consult his own attorney before agreeing to file such a suit. (A. 7-8).

There is nothing in the record to dispute the fact that Cranston was contacted by the witness John Seremet after the latter had conferred with attorney Frederick U. Conard, Jr., counsel for defendant-interveners and CMPA, and Louis Longo, owner of a large "nearby" farm in Connecticut and president of the CMPA, concerning the contacting of such prospective plaintiff. (A. 10-12, 22, 26). Moreover, Mr. Cranston admitted that he and the other two original named plaintiffs consulted Attorney Weatherwax *after* receiving Seremet's telephone call. (A. 17-18).

The former CMPA official (John Seremet) who contacted plaintiff Cranston freely admitted that he contacted Cranston for the purpose of instituting a suit. (A. 10) and he positively did *not* testify that he "had heard rumors" that Cranston intended to commence a suit, as stated in the *Cranston* opinion. Moreover, this individual knew of no meeting of the CMPA that preceded or authorized his contacting of Mr. Cranston (A. 12-13), although he did testify that Attorney Conard previously gave him the name of an attorney to represent the prospective plaintiffs prior to the contacting of Cranston. (A. 10-11). Although the *Cranston* opinion states that the CMPA "checked out" the *Cranston* plaintiff's present attorney because they wanted "good attorneys on both sides of the question", the record discloses that it was opposing counsel Conard that checked out plaintiff's attorney (A.11),

and the *Cranston* opinion fails to note that the attorney initially recommended by Attorney Conard to act as plaintiffs' counsel had no experience in the specialized field of milk marketing litigation and that he has acted as Conard's associate counsel in the *Cranston* case. (A. 10-12). Additionally, the record reflects that the prospective plaintiffs were not allowed to consult their present attorney for the purpose of instituting the *Cranston* suit until after opposing counsel Conard checked out Cranston's present attorney. (A. 12). [12]

The *Cranston* opinion refers to a "meeting between CMPA officials, plaintiffs and Attorney Weatherwax" that occurred on February 3, 1967, but it fails to note that Attorney Conard and Louis Longo, CMPA president who owns a large "nearby" farm, traveled from Hartford, Connecticut, to the home of Cranston at Troy, N.Y., on "an icy, freezing morning" on February 3, 1967, "for the purpose of discussing the bringing of this suit." (T. 349). (A. 19-20, 22).

The *Cranston* opinion also fails to mention that Attorney Conard transported the three prospective plaintiffs to Attorney Weatherwax's office for their first consultation concerning the institution of the *Cranston* suit on February 3, 1967 (A. 19), or that Mr. Longo had admitted he would be affected financially by the elimination of the nearby differential. (A. 28). There is no plausible reason in the record for such trip to Cranston's home or for the transporting of the initial three prospective plaintiffs to the office of attorney Weatherwax on said date, particularly when the parties maintain that Cranston was already represented by Mr. Weatherwax

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[12] Contrary to the statement in the District Court's opinion that Cranston had been against the nearby differential, the record discloses that he tried to expand it to cover his own farm as recently as 1966. (A. 6-7).

and the latter had been "checked out" by attorney Conard.

The *Cranston* opinion also fails to note that at least 90 percent of the non-nearby dairy farmers who became aware of the factors permeating the *Cranston* suit requested its dismissal.[13] The plaintiff Cranston admitted that he had not advised any other producers of that suit, either prior or subsequent to its institution (A. 2), and the opinion fails to indicate such fact or that Mr. Cranston sold his cows after the trial and retired from the dairy business. (A. 7). The *Cranston* opinion states that the CMPA decided to "aid" its members by "reimbursing such members for reasonable expenses and attorney fees", but all four of the individual plaintiffs testified that they had no liability for either expenses or attorney fees and reimbursement therefor can hardly exist under such circumstances. (A. 5, 21, 23-25).

The *Cranston* opinion fails to note that Attorney Conard was associated with petitioners' counsel in the *Blair* and *Allen* cases on the side of the nearby producers and nearby differential, and that every attempt had been made in *Allen* to preclude the presentation of the non-nearby producers' case, including appearance in court on various matters with little or no notice to

[13] The District Court's decision is also incorrect in stating that there were 3,000 nearby producers and 250 non-nearby producers, in that there were only about 1,800 nearby producers and only about 90 non-nearby producers. About half of the latter are petitioners, and most of the rest know nothing of this case because located in other areas.

opposing counsel and attempts to prejudice the non-nearby producers by improper financial pressures – such as refusal to print relevant portions of the record and efforts to force non-nearby producers to bear an unfair part of the expenses of the nearby producers' appeal. In view of the fact that the CMPA admittedly acted in the names of the individual nearby producers in both *Allen* and the *Cranston* case, it is submitted that the contrasting treatment in the two cases does not support the statement in the *Cranston* opinion that the payment of expenses and attorney fees of opposing counsel in *Cranston* is attributable to the fact that the CMPA is a "democratic" organization. Additionally, Attorney Conard has vehemently opposed the entry of any unselected non-nearby producer or unapproved attorney into the *Cranston* case, and no non-nearby dairy farmer has been able to intervene therein even for the purpose of taking depositions or discovery.

The *Cranston* opinion also fails to note that the collusion hearings disclosed that two of the six individual plaintiffs did not even know that they had been listed as plaintiffs (A. 3), and one such listed plaintiff was unable to identify the plaintiffs' counsel in *Cranston*, further testifying that he had never met or communicated with Attorney Weatherwax, and the latter admitted that this was true (A. 3) in spite of his earlier representation to the Court during the trial:

> "MR. WEATHERWAX: The Court please, *I had anticipated named plaintiffs Roy Ottman and George Mesick, Jr., would be here to testify today*, but both have illnesses in their homes and were unable to be here. *So I have just verified that fact*, so I will

not be able to produce their testimony today, *and I will not produce it any any time,* for that matter, as I feel perhaps that the testimony of the other named plaintiffs will probably be sufficient for the purposes for which their testimony was offered.

THE COURT: That is Ottman and Mesick, those are the two plaintiffs you mentioned?

MR. WEATHERWAX: Yes. * * *." (R. 1163, pp. 118-119)

Although it is absolutely incredible that attorney Weatherwax could expect these two alleged plaintiffs to be present to testify at the trial when he admittedly had never spoken to them concerning this suit, that assertion pales by comparison with the lower court's findings and opinion which state that Ottman and Mesick *brought* this suit but are being allowed to *withdraw* as individual plaintiffs.

The Notice of said collusion hearing failed to advise dairy farmers of the matters alleged by applicants for intervention and was actually a show cause order that was worded in such a manner that it could only serve to dissuade any dairy farmer from challenging the *Cranston* suit. Such farmers had to take the stand subject to cross-examination but the attorneys were not even required to submit a signed statement to the Court, and no question was asked of Attorney Conard or any of the parties by the district court. The petitioners' main witness testified for 14 pages of the record but was cross-examined for 54 pages of the record. The president of CMPA, Louis Longo, who owns a large "nearby" farm in Connecticut, testified for 33 pages of the record for

the parties, but the petitioners' counsel was interrupted after 5 pages of cross-examination and asked how much longer he was going to take. The hearings on collusion did not adequately treat this subject, and the petitioners advised that important witnesses were outside the jurisdiction of the court. The district court had also required the petitioners to submit the names of all intended witnesses and its order provided that it would determine if their presence was necessary after objection thereto by the parties, the said Order further providing that the court would question the witnesses in the first instance.

Although the *Cunston* opinion states that all aspects of the claim of collusion were explored and every interested person given an opportunity to be heard, the petitioners were not allowed to take depositions or discovery, and they could not examine any of the parties or counsel in *Cunston* without making the same their own witnesses. They were not allowed to ask any questions of a witness concerning the merits of the case, even to illustrate the inaccuracy of the testimony of such witness.

Although the plaintiffs' counsel in *Cunston* presented no witnesses, other than the minimal testimony of the four plaintiffs during the trial, the plaintiffs did not file any motion for summary judgment or even a motion to hold that case in abeyance pending a decision on the *Allen* appeals. Copies of both motions and the *Blair* and *Allen* briefs were furnished to the *Cunston* plaintiffs.

A second main point relevant to the questions of solicitation and collusion relates to the manner in which the defendant and interveners replaced and supplemented the testimony in the administrative records upon which

the Secretary had promulgated his findings and decisions concerning the nearby differential, and this fact is also relevant in respect to the inability of petitioners to examine the trial record prior to the collusion hearing or to question any witness concerning the merits during the collusion hearing.

The *Ounston* opinion refers primarily to the CHPA but the complaining dairy farmers in *Ounston* alleged that the suit was conceived and instigated by the same attorneys that represented the nearby interests in *Blair* and *Allen*. They further alleged that the "trial" in *Ounston* was for the purpose of overcoming the admissions in *Blair* that the "market differential" was correctly defined in the Congressional Reports and could not formulate a basis for the issuance of the nearby farm location differential. The only witnesses who testified in *Ounston* in this regard were Attorney Reuben Hall, who was associated with Attorney Conard in *Blair* and *Allen* as counsel for the CHPA and NEMPA, personnel from the USDA, and the witness Kane. The latter's testimony rested upon a 1935 draft of proposed revisions to the Act that was never produced to substantiate his testimony because of the obvious inconsistency between his testimony and said draft. The testimony of the other witnesses that attempted to cast doubt on the Congressional definition of the market differential can only be viewed as fantastic, in that the defined market differential admittedly existed in the very area of the *Ounston* trial both prior and subsequent to federal regulation. In spite of this fact and the presence of the market differential in both the Connecticut and the Mass.-Rhode Island milk orders as a part of the zone differential, 7 C.F.R. 1015.62, 1001.62, the *Ounston*

opinion fails to recognize that the market differential is included in said orders, and the decision rests on the incredible testimony of such interested attorneys and governmental personnel who allegedly "knew of no differentials which would in any way fit the definition of market differentials contained in the reports."

In this connection, it is noted that Attorney Weatherwax filed a brief for 24 handlers or dealers in the 1956 N.Y.-N.J. administrative hearings that dealt solely with the market or direct-delivery differentials payable in the secondary markets of Upstate New York, but said brief was never introduced in the *Ounston* trial to rebut the testimony that the market or direct-delivery differential did not exist in such secondary markets.

Also, attorney Weatherwax never advised petitioners' counsel that there was to be a trial of more than one day's duration below or that the bulk of the testimony was to relate to the Boston milk order involved in *Allen*.[14] Moreover, the petitioners note that virtually nothing from the early administrative records was included in the joint appendix below, although the opinion of the District Court purports to be based on a determination that the Connecticut nearby differential is legal because the 1937 Greater Boston Order nearby differential is allegedly legal. This conclusion rests on the testimony of attorney Reuben Hall, counsel for the CMPA, NEMPA

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[14] Petitioners' counsel also represented the plaintiffs-non-nearby dairy farmers in the *Blair*, *Allen* and *Harrington* cases, and the introduction of testimony and evidence in *Ounston* concerning the Boston milk order differential involved in the *Allen* case could have affected the disposition of that then pending case and escrow fund of $10 million.

and smaller associations in both the *Blair* case and the *Allen* case, and to a much lesser extent upon the testimony of witness Donald Kane, also a former attorney, and it is significant that the brief filed by plaintiffs in the District Court appeared to accept much of attorney Hall's testimony as factual and actually lauded said witness, failing to ever bring out that said attorney was associated with attorney Conard in the *Blair* and *Allen* cases. The impression was left below that Mr. Hall was simply a disinterested and expert witness who had no particular desire to see one side or the other prevail in this suit.

Further, attorney Weatherwax had not read the administrative record prior to the trial on October 18, 1967, although this was an obvious necessity for any proper representation of the plaintiffs during trial.

Of additional significance in this regard is that defendant's counsel also withdrew filed opposition to the maintenance of the *Cunston* suit as a class action after the filing of the *Hennington* case, and he affirmatively sought the granting of the motion for a class action order in *Cunston* after having vehemently opposed such an order in the *Allen* case. These inconsistent actions speak for themselves, as does the action of attorney Conard in consenting to the class action motion of plaintiffs and the motion for a preliminary injunction that would result in the escrowing of the differential payments. Two similar motions in the *Allen* case were opposed by counsel for CMPA and defendant-interveners represented by the CMPA therein.

Petitioners respectfully submit that the record discloses that this suit is collusive as a matter of law and otherwise, and that additional suits of such nature may be

filed if the parties are able to not only bring the present suit in such manner but be greatly over-compensated therefor. Unless this Court acts, future private and collusive suits will prevent dairy farmers from exercising their constitutional rights to obtain due process through a truly *bona fide* suit. Petitioners also respectfully maintain that the Court of Appeals obviously considered this case almost exclusively from the standpoint of the merits, but may have given more attention to petitioners' appeals if it intended to uphold the District Court's decision. However, petitioners are fearful that in the long run, the upholding of the District Court's decision and authorizing payment of attorneys' fees to counsel under such circumstances will prove to be a greater threat to their most basic constitutional rights, a fact which is shown to some degree by the present joint actions of the parties' counsel herein.

Although the Second Circuit has reversed the District Court's decision on the merits on the basis of this Court's decision in *Zuber v. Allen*, petitioners believe that the current posture of this case in respect to the joint proposal of the attorneys for the named plaintiffs and defendant-interveners concerning extension of the illegal nearby differential and disbursement of about 50% of the escrow fund or $500,000 to the said attorneys for losing performances herein illustrate why this Court should grant this petition for a writ of certiorari.

Petitioners do not believe that any decision of this Court authorizes either of the two main objectives of the said joint proposal, and that the decision of this Court in *Zuber v. Allen*, cited by the parties' counsel as a basis for such joint proposal, specifically applies to prevent either objective. In addition to holding the

nearby differential illegal, this Court discussed cases dealing with the proper function of both the Court and the administrator, and the following statement appears pertinent in regard to the actions which have repeatedly delayed final disposition of the *Gunston* case: [15]

> "Lest losing parties be encouraged to prolong litigation by frivolous appeals in order to reap a windfall, we think respondents deserve the fruits of their victory as of the final judgment at trial."

Petitioners respectfully submit that this Court's prior decisions disclose that it has full power to order the disbursement of the involved escrow fund to non-nearby producers even if the Court should rule that the *Gunston* suit was collusive as a matter of law and an improper class action. Furthermore, the *Herrington* case which is still pending in the U.S. District Court for the District of Columbia requests that the Secretary be enjoined from disbursing any present escrow fund collected in any other

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[15] In regard to the present claims of "disorderly marketing" as a result of termination of the nearby differential and the need of nearby producers for a "breathing spell", we note that the District Court adopted the nearby producers' argument that the nearby differential was not a market barrier, and that the Federal Milk Order Study Committee Report of December 1952, pp. 76-77 stated that milk could not enter the Connecticut market because of Connecticut sanitary regulations, a fact which shows control over the influx of milk and which was admitted by the testimony of the CMPA economist set forth with the FMOSC Report at pp. 19e-33e of the brief of Russell Allen, et al., in opposition to the brief of the State of Connecticut in opposition to the petition of Allen, et al., for certiorari in No. 861, October Term, 1968, *Zuber v. Allen*.

action, and all of the parties have admitted on the record the illegality of the Connecticut nearby differential. This Court could also direct the disbursement of such escrowed monies under the jurisdiction of the Bennington court with specific instructions concerning eligibility for counsel fees and expenses therefrom. *Inland Steel v. U.S., et al.*, 306 U.S. 153; *S.E.C. v. Chenery Corp.*, 332 U.S. 203; *U.S. v. Morgan*, 307 U.S. 183.

CONCLUSION

The petition for certiorari should be granted and an order issued staying disbursement of the escrow fund except to non-nearby producers by the District Court and directing the immediate termination of the nearby differential and the escrowing thereunder.

Respectfully submitted,

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APPENDIX A

PORTIONS OF HEARINGS IN CRANSTON v. FREEMAN

May 15, May 27 and June 10, 1958

• • • • •

Although the government and the aforesaid counsel for the nearby producers strongly questioned the maintenance of the *Allen* case as a class action and insisted that 6,000 non-nearby producers located in three of four states were indispensible parties, it is noted that only the government opposed the maintenance of the *Cranston* suit as a class action and government counsel subsequently withdrew such objections only in the *Cranston* case:

> "THE COURT: Does the Government wish to be heard?
>
> MR. KRAUSE: Your Honor, we do not intend to present any evidence on this subject, and we have no objection to the maintenance of the class action, either on behalf of the plaintiffs or on behalf of the defendant-intervenors. • • • •"
>
> THE COURT: Well, as far as the Order, and I frankly do think we are at the point where the Court should comply with the rule and enter an Order –
>
> MR. KRAUSE: As I say, we have no objection to that." (R. 1164; T. 299-301).

In respect to notification of other dairy farmers concerning the *Cranston* suit, the plaintiff Cranston testified

as follows on May 27, 1968, concerning the institution of that suit on February 9, 1967:

> "Q. What other producers did you actually talk to *before* you instituted this case, concerning the institution of this case? A. I don't recall that I talked with any others than I have mentioned regarding the institution of the case. • • • (other two plaintiffs)
>
> Q. Now, *after* the institution of this suit, what producers did you then contact and advise of the pendency of this suit? A. Mr. Ottman, Mr. Phillips and Mr. Mesick.
>
> • • • • •
>
> Q. And Mr. Ottman, Mr. Phillips and Mr. Mesick are in the 23-cents zone, which is different from the zone that the initial three plaintiffs were in; are they not? A. This is correct.
>
> Q. And they were subsequently added as plaintiffs to the case by an amended complaint? A. Yes, sir."

The individual plaintiff Mesick testified as follows on May 27, 1968, in the *Cranston* collusion proceeding:

> "Q. Can you tell me whether you had knowledge of your being a plaintiff in this particular action? A. Not until the other day.
>
> Q. Now, your testimony is that you did not know, until the other day, that you were a plaintiff in this particular action? A. That is correct.

Q. And can you identify Mr. John P. Weatherwax for me, please? (plaintiffs' attorney) A. I could not, other than since I came into this courtroom I realized where Mr. Weatherwax is sitting.

Q. And you name is, however, listed as an individual plaintiff in this action, representing a class of other dairy farmers? is that correct? A. Well, apparently.

• • • • •

Q. In other words, you discussed this with Mr. Ottman, who is also listed as a plaintiff in this case? A. Yes.

Q. And he was also unaware of this fact? A. This is correct.

Q. In other words, you never authorized your name to be affixed to any of these pleadings as a plaintiff; is that correct? A. No; I certainly did not.

• • • • •

Q. Had you ever met Mr. Weatherwax or did you know him before this day? A. To the best of my knowledge, no."

The plaintiffs' attorney in *Cranston* testified as follows concerning the foregoing testimony of Mr. Mesick:

"Q. Now, have you ever spoken to either Mr. Mesick or Mr. Ottman concerning this action? A. Personally?

Q. Yes. A. No."

The transcript of the trial itself discloses the following at pages 118-119 concerning the non-appearance of Ottman and Mesick at the trial:

> "MR. WEATHERWAX: The Court please, I had anticipated named plaintiffs Roy Ottman and George Mesick, Jr., would be here to testify today, but both have illnesses in their homes and were unable to be here. So I have just verified that fact, so I will not be able to produce their testimony today, and I will not produce it at any time, for that matter, as I feel perhaps that the testimony of the other named plaintiffs will probably be sufficient for the purposes for which their testimony was offered.
>
> THE COURT: That is Ottman and Mesick. Those are the two plaintiffs you mentioned?
>
> MR. WEATHERWAX: Yes. • • • ".

The plaintiff Phillips in the *Cranston* case maintained that he had contacted plaintiffs Ottman and Mesick but he appeared to contradict himself during the hearings on collusion and inadequacy of representation:

> "Q. Now, when was the first occasion that you met with the other plaintiffs concerning this case? A. As a group, I think prior to the fall trial. I had talked to Mr. Cranston on the phone about it, but I hadn't attended any meetings."
>
> • • • • •
>
> "Q. Now, did you – when was it that you first discussed the litigation with Mr. Mesick? A. Oh, probably a year ago. I couldn't begin to say the date, but I would say about a year ago.

Q. Well, now, how far before the trial in October of 1967 had you discussed it with Mr. Mesick? A. Well, long enough to get his approval and inform Mr. Cranston that they were willing to have their names used.

Q. Well, now, I didn't ask you about any other individual. I was asking about Mr. Mesick. *Have you ever had any meeting with Mr. Mesick and Mr. Ottman, together, and yourself?* A. No, I have not.

Q. And do you have any financial contract or understanding of any nature with Mr. Weatherwax, your attorney, concerning the expenses and the fees of this proceeding? A. No, I do not.

Q. Did you have any conversation with Mr. Mesick or Mr. Ottman on this subject? A. *I don't know.* We might have, generally, talked about it, because there is always costs involved in such things, but nothing definite.

Q. Now, what do you mean 'costs involved in such things? Wouldn't this be a logical subject that would be immediately brought up? A. Well, yes. *As I say, it was a subject that was brought up,* but I don't know that we arrived at any conclusion.

Q. Are you saying that Mr. Mesick or Mr. Ottman would enter into a situation of this nature without knowing anything about the financial arrangements? A. Well, as I got involved in it, we were asked to participate as the intermediate group, and I think we all jointly concluded that Mr. Cranston and Mr. Weatherwax were handling the case and we

would lend our assistance because of our location.

Q. Now, when you say 'we', did somebody ask you and Mr. Ottman and Mr. Mesick in a group? A. Well, I was asked individually, and I think the others were, also.

Q. But you don't know that for a fact, do you? A. *Well, I never asked them.*"

The record in the *Cranston* case discloses the following testimony by the plaintiff Cranston on the question of his fitness to represent the class plaintiffs:

"Q. Now, you feel very strongly, Mr. Cranston, about the nearby differential of the Connecticut Milk Order? A. What do you mean 'feel very strongly'?

Q. Against it. A. Against it, yes.

Q. And yet, you didn't notify anybody about the litigation, other than Mr. Ottman, Mr. Phillips, and Mr. Mesick? A. No.

Q. And you feel that you can adequately and fairly represent the plaintiffs' class in this suit under the circumstances? A. Well, I believe that was a ruling in this Court.

MR. WEATHERWAX: Now, Harold, don't go into that. He just asked you a simple question. Now, answer the question as best you can.

THE WITNESS: Yes.

MR. WEATHERWAX: Okay. That takes care of that.

BY MR. RYAN:

Q. Now, isn't it a fact, Mr. Cranston, that you are not even a milk producer at this time? A. This is true." (T. 270-71).

The witness Seremet, CMPA manager for 26 years, testified as follows concerning the plaintiff Cranston during the collusion hearings:

"Q. Do you know whether or not he was regarded, in his locality, as a spokesman *against* the nearby differentials? A. He had initiated some action, previously, with regard to the nearby differentials.

Q. Can you tell us approximately when Mr. Cranston had initiated previous action? A. There was a petition signed by he and others with regard to nearby differential *expansion* in the Federal Order hearings, but I can't remember the dates."

Witness Alexander Marbot, a non-nearby producer, testified as follows during the *Cranston* collusion hearings:

"Q. Now, have you ever had any conversation with any individual concerning the nearby differential of the Connecticut Milk Marketing Order? A. Yes, with Ted Blakely and a man by the name of Frank Bragg. That was a long while.

Q. Now, will you identify those individuals? A. Well, Frank Bragg is the field man, and I

don't know what Blakely is. I believe he is a trouble shooter of some sort, but I just don't know.

Q. With whom? A. Beg pardon?

Q. With what organization? A. With C.M.P.A.

Q. All right. Now, when did this conversation occur? A. I believe it was January the 21st, the first time they approached me to sue for the differential, and to sue in Connecticut, that they would break the differentials but hold the Federal order in Connecticut, and they approached me three times on this.

Q. Now, when you say 'break', they told you that they would 'break the differentials', what do you mean by that? A. I asked them what they meant by that, and *they said I would get 46 cents a hundred more for my milk.*

Q. If you brought this case? A. To court, and, after the third time, I told them I wanted to see my lawyer and talk it over with him before I would say yes or no. And then they thought they might be back that day or the next day, and I haven't seen them since. I have seen Bragg, as field man, and Blakely I haven't seen since, and, later, I heard Cranston and the other boys were opening a suit.

Q. Now, I want you to state this again if you would. Now, you are stating that these CMPA personnel or officials asked you to bring this case in the State of Connecticut and that it would result in the breaking of the differentials,

that you would receive 46 cents more for your milk; is that correct? A. That's right."

• • • • •

Under cross-examination by Mr. Weatherwax, the witness testified (T. 157) that Mr. Blakely had stated:

"A. • • • 'Yes, Marbot, it won't cost you one penny. We will pay the attorney that we appoint to you. If he loses, we pay him. If he wins, it will come out of the escrow account. It won't cost you one penny,' is what they told me, but, when I wanted to see my lawyer, that was the end of it."

The witness Seremet also testified as follows concerning the institution of the *Cranston* suit on February 9, 1967:

"Q. Now, did you, at any time, talk to Harold Cranston, either on the telephone or in person, concerning the institution of this action? A. Yes.

Q. And could you tell me when that was? A. Sometime the latter part of January.

Q. Well, would you be a little more specific as to the date? A. If I recollect, it would be around the 27th of January.

Q. And was that in person or by telephone? A. By telephone, sir.

• • • • •

Q. In January of 1967, when you telephoned Mr. Cranston, what was the subject of your conversation at that time? A. As I recall it, it would concern itself with the nearby differential that was a result of the *Blair* decision.

• • • • •

Q. And how would the *Blair* case enter into your contacting these particular producers? A. As I recall, the *Blair* case ruled out the nearby differentials in the New York Order. There was an action taken in the Boston, the Massachusetts–Rhode Island Order, on the nearby differentials, and it occurred to us that action in the Connecticut Order might be well worth taking • • • ."

"Q. Now, did you ask Mr. Cranston if he would institute a suit at that time? A. Asked him if he would be interested in instituting a suit, he and others." (T. 173; see also 167-168).

• • • • •

Q. Now, you recommended an attorney, at that time, for Mr. Cranston to consult? A. Yes. We had – the association or I had a name of an attorney in Albany by the name of Brearton, that was recommended as a potential attorney to handle the case.

Q. Now, who recommended Mr. Brearton? A. Mr. Conard.

Q. Mr. Conard; and is Mr. Conard counsel for your association? A. Yes."

• • • • •

"Q. Now, when did Mr. Conard recommend to you Mr. Brearton, prior to your making the telephone call to Mr. Cranston? A. It would be prior to the call; how soon prior to that, I really can't recall, at this point.

Q. Well, what were – where was that – where did that conversation take place?
A. (No Response)

* * * * *

Q. And did Mr. Cranston accept the offer of Mr. Brearton's services? A. Of what?

Q. Did Mr. Cranston accept your offer of Mr. Brearton's services, as the prospective Plaintiff's attorney? A. I don't recall that he accepted. He suggested another attorney.

Q. And what was your response when he suggested another attorney? A. That we would like to check on his reputation and see what kind of an attorney he was, if he was capable.

Q. And did you subsequently do that?
A. Yes.

Q. And how soon after your telephone call with Mr. Cranston was that done? A. I don't recall, at this point.

Q. Did Mr. Cranston identify the attorney that he desired to have represent him? A. Yes.

Q. And who was that? A. Weatherwax."

* * * * *

"Q. Now, has Mr. Brearton ever handled any milk case or milk litigation, to your knowledge? A. No, I do not know.

Q. But you testified you were desirous of furnishing a competent attorney? A. Yes, sir."

• • • • •

"Q. Well, you have indicated that you told Mr. Cranston that you wanted to check out Mr. Weatherwax to see whether he was competent and so forth. Now, how long after that was Mr. Cranston told that it was okay to proceed with a suit and to contact Mr. Weatherwax? In other words, was this in a matter of a few days or weeks? A. It would have been in a matter of a few days."

• • • • •

"Q. Mr. Seremet, other than yourself and Mr. Conard, I believe you testified Mr. Longo – were there any other individuals that were aware of your telephone call to Mr. Cranston, in the association? A. I don't recall.

Q. You don't recall? A. No.

Q. In other words, was there any special meeting called for this purpose, or was this an individual thing on the part of these persons?"

• • • • •

"A. It has been a board policy to defend the nearby differentials and the Connecticut price, and this is an action in line with that policy.

Q. That wasn't my question, Mr. Seremet. Was there any meeting that preceded your telephone call to Mr. Cranston? A. *I know of no meeting, other the district meetings that we had been holding at that time of the year in all of our districts.*

Q. Those district meetings are concerned with many matters, are they not? A. Correct.

Q. Now, what I am asking is, was there any specific meeting that preceded your telephone call to Mr. Cranston? A. *I don't recall any specific meeting, sir.*

Q. Are you stating this was individual action, by yourself?

MR. GOLDBLOOM: Objection, Your Honor.

THE COURT: Sustained.

BY MR. RYAN:

Q. Do you know of any formal meeting that was called with respect to the institution of this action by Mr. Cranston?

MR. GOLDBLOOM: I object.

THE COURT: Sustained. You have asked that about three different ways."

* * * * *

"Q. Now, did you indicate anything concerning payment of expenses of the lawsuit? A. Yes, we discussed the problem.

Q. In what specific manner? A. In this area, that the nearby producers were going to

be supplied with counsel to defend their position, or we would assume the expenses of that, and we would be willing – we, the association, would be willing to help in supplying the attorneys for the distant producers.

Q. And you would pay the fees of those two attorneys? A. Well, I don't know if that was mentioned as fees. Certainly, if distant producers won the case, that the escrow monies would probably take care of the expenses of the attorneys.

Q. Now, how do you know that to be a fact? A. I don't.

Q. In other words, if the attorney for the distant producers lost the case, he would be compensated by the association? A. Reasonable expenses would probably be compensated.

Q. And that includes an attorney's fee? A. I would think so, part of it." (T. 174-75).

* * * * *

"Q. Well, the *Allen* decision was on June 15 of 1967. Now, did the Association attempt to intervene in that case? A. In the *Allen* case?

Q. Yes. A. Yes, we did, sir.

Q. And who was your attorney at that time? A. Mr. Reuben Hall and Mr. Conard.

Q. And did you have local counsel in Washington at that time? A. Probably through Mr. Hollman.

Q. Of Klasgbrunn & Hanes; Mr. Lawrence, Hollman? A. I really don't know, at this point. It was Mr. Hall that the contact was made with, and through Mr. Conard.

Q. You did not, at that time, seek to obtain an attorney in the District of Columbia, yourself; is that correct? A. No.

Q. Now, prior to the *Blair* decision, had any producers ever indicated an interest in bringing any legal action to challenge the nearby differential of the Connecticut Order? A. I don't know about legal action. There certainly were producers who had asked to have Federal order changes made, to change the —

Q. Were there not many objections by distant producers to the differential? A. There were some objections; yes, sir.

Q. At that time, did you offer to provide an attorney or to attempt to institute any suit in behalf of those producers, prior to the *Blair* or *Allen* decisions? A. This was in connection with Federal orders. I don't know of any other legal action that was taken.

Q. No, I realize that, but, prior to the *Blair* decision and the *Allen* decision, did you ever attempt to accommodate your distant members with respect to institution of any legal action, to challenge the nearby differential of the Connecticut Order? A. No."

* * * * *

"Q. You stated that your distant members did evidence opposition to the differential prior to the *Blair* case. A. There were some distant producers that wanted to be included in the nearby zones, yes.

Q. And you – did you, at that time, take any action to provide them with an attorney or expenses or anything to contest the particular differential at that time? A. I don't recall that we had."

* * * * *

"Q. And didn't you feel that these producers that you desired were competent to take their own legal steps? A. I didn't question whether they would desire it.

Q. But you did not wait to see whether they would do so, is that correct, after the *Blair* decision? A. There was a period of time where we waited, yes."

The witness Seremet testified as follows under examination by CMPA counsel:

"Q. Now, where – Mr. Seremet, whether Mr. Cranston chose Mr. Weatherwax for his lawyer or any other member of the bar, did you agree, by words or inference, to pay Mr. Weatherwax or any lawyer, any sum of money whatsoever? A. I told Mr. Cranston that we would help in the expenses – a reasonable amount in the expense of the defense of their position."

* * * * *

"Q. All right. Now, I am going to ask my question again. Did you, at any time, by words or inference, say or suggest that you would pay any money to Mr. Weatherwax or any other member of the bar? A. I am not positive.

Q. *I am only talking about the conversation with Mr. Cranston.* Did you, sir, say or suggest that you would pay any money to Mr. Weatherwax or any member of the bar? A. I don't recall that; no, sir.

Q. So you believe that you did not say it? A. I did not."

The plaintiff Cranston, a CMPA member like the other two original plaintiffs testified as follows at the collusion hearings:

BY MR. RYAN:

"Q. Now, what was the balance of the conversation, Mr. Cranston? A. Well, he asked if I had a lawyer. I said I did – we did.

Q. Now, who is 'we'? A. Mr. Carlson, Mr. French, with whom I had discussed this.

Q. And you had discussed it with them when? A. On different occasions.

Q. Well now – A. Over the past several years, none of us have been happy with this.

Q. I realize that, Mr. Cranston, but you have now testified that you told – if my recollection is correct, that you told Mr. Seremet that 'We had a lawyer.' A. Yes.

* * * * *

"Q. When did yourself, Mr. Carlson and Mr. French obtain a lawyer? A. I can't remember the exact date.

Q. Well, was it prior or subsequent to the time of Mr. Seremet's telephone call, concerning which you are now testifying? A. As I stated before I have talked with John (Weatherwax) because he is a neighbor

Q. Yes. A. – Mr. Weatherwax, on many occasions, about the discrepancies that exist in the payments. We were agreed that it was a ridiculous situation.

MR. RYAN: Your Honor, the witness is not being responsive to the question at all.

THE COURT: I believe he is. Mr. Ryan's remark, construed as a motion to strike, is denied.

BY MR. RYAN:

Q. When, Mr. Cranston, did you, Mr. Carlson and Mr. French obtain the services of a lawyer; was it prior or subsequent to this telephone call? A. It was subsequent."

* * * * *

"Q. Now, when did you first go to Mr. Weatherwax for the purpose of instituting this litigation? A. I can't remember the date.

Q. Now, how much time elapsed from the time that you, Mr. Carlson and Mr. French consulted Mr. Weatherwax and the time that this suit was filed, approximately? A. I can't remember that exactly. I am sorry, but I didn't make a record of any of this stuff.

Q. Well, could you tell me – A. I didn't think it was important at the time.

Q. Well, could you tell me whether it was a matter of days, weeks, months, or do you have any approximate estimate? A. A week, more or less, maybe.

Q. Pardon me? A. A week, more or less, maybe. I don't know exactly.

Q. And did you all go to Mr. Weatherwax's office to consult him, or what were the circumstances? A. If you mean Mr. Carlson, Mr. French and myself, yes we did.

Q. And how did you go; together by automobile, one automobile, or separately, or what? A. I believe there were two carloads of us – two cars of us.

Q. And was anybody with you, at that time, other than yourself, Mr. Carlson and Mr. French? A. Yes.

Q. Could you state who they were, please? A. Mr. Longo.

Q. And who is Mr. Longo? A. He is the President of the CMPA.

Q. And was there anybody else with you? A. I believe Frank Bragg.

Q. And who is Mr. Frank Bragg? A. He is a fieldman with the CMPA.

Q. And was there anybody else with you? A. I think Ted Blakely was there.

Q. And who is Mr. Blakely? A. Well, I don't know what his exact position is. He works for the CMPA.

Q. And was there anybody else there? A. No, not in Mr. Weatherwax's office.

Q. No, that went with you to Mr. Weatherwax's office. Did not, in fact, Mr. Conard and another attorney go with you? A. Mr. Conard never went to Mr. Weatherwax's office with us.

Q. Did he come to your home? A. He came to my home, yes.

Q. In the company of the other individuals? A. That is correct.

Q. And did he go into Troy with you? A. He rode down to Troy with us, yes."

* * * * *

"Q. And during your conversation with Mr. Seremet, your telephonic conversation that you testified to, was anything else discussed, at that

time, concerning payment of fees or the expenses – the expenses or fees of the case? A. I believe Mr. Seremet explained that.

* * * * *

"Q. Well, now, I am asking the question, what are the financial arrangements in the event that the plaintiffs do not prevail in this litigation? A. There is no written agreement that I know of.

Q. Well – excuse me. A. We expect to win the case, but, in the event we don't, I suppose we will be submitted a bill by Mr. Weatherwax, *which we will promptly resubmit to the CMPA* and hope that they come through on their word. That is all I know."

* * * * *

The plaintiff Cranston testified as follows under examination by his own attorney:

BY MR. WEATHERWAX:

"Q. And as a – and then, the question came up that, in the event that the suit went against the plaintiffs – finally went against the plaintiffs that only in that event would the CMPA take care of the minority; is that not it?

MR. CRANSTON: This is substantially correct."

The record reflects the following testimony by the plaintiff French when examined by his own attorney:

BY MR. WEATHERWAX:

"Q. Do you recall meeting at Mr. Cranston's home on February 3rd, 1967, *for the purpose of discussing the bringing of this action?*
A. The first part of February. I don't know whether it was the 3rd or not.

Q. Do you remember, at that time, some gentlemen from Connecticut came to Mr. Cranston's home? A. Yes.

Q. And do you remember, later on, you people coming to my office? A. Yes.

Q. Now, do you see Mr. Conard, the lawyer, the gentleman sitting in the third from the end – this end. Did he call, with some other CMPA members, at Mr. Cranston's home on that day? A. Yes."

* * * * *

On cross-examination plaintiff French testified as follows in respect to the meeting of February 3, 1967 (351-52):

"Q. Mr. French, on February 3, 1967, you attended a meeting at Mr. Cranston's home?
A. We met at Mr. Cranston's home, yes.

Q. Did you actually have a meeting on that date at his home? A. Well, we met there and talked for awhile, while we were waiting to go down to Mr. Weatherwax's office.

Q. But, as a meeting as such, was that actually a meeting, or was it a gathering point? A. It was – I would say it was a gathering point.

Q. Pardon me, sir? A. I would say it was a gathering point.

Q. Yes. Now, prior to that time, had you ever attended any meeting at Mr. Cranston's home concerning the nearby differentials or the institution of this action? A. No; I didn't at his home.

Q. Had you attended any meeting or conference at Mr. Weatherwax's office prior to the date of February 3, 1967? A. No.

Q. Are you personally obligated in any way, concerning any of the financial aspects of this case, as far as expenses or attorney fees are concerned, sir? A. No."

* * * * *

"Q. Now, did you attend the trial, sir? A. Just the first day.

Q. And have you ever read any of the pleadings that were filed? A. No, I didn't." (T. 354).

The plaintiff Phillips testified as follows during the *Cranston* collusion hearings:

"Q. And do you have any financial contract or understanding of any nature with

Mr. Weatherwax, your attorney, concerning the expenses and fees of this proceeding? A. No, I do not."

• • • • •

"Q. Now, have you ever been in the office of Mr. Weatherwax, your attorney, other than on February 3rd, 1967? A. I think I mentioned, awhile ago, that I wasn't in there on February 3rd.

Q. Yes, you did. I am very sorry, sir. Have you ever been in Mr. Weatherwax's office? A. No, I have not.

Q. Have you ever received any of the pleadings that have been filed in this action? A. I read the summary.

Q. What are you referring to when you say 'summary', sir? A. Of the hearing.

Q. Do you mean after the trial? A. Yes.

Q. Had you ever read anything prior to the trial? A. No."

• • • • •

"Q. And you attended the trial, you say, for one day. Was that your testimony, sir? A. I did attend the trial for one day.

Q. Yes, and how many days did the trial last? A. Well, I heard them mention it here. I was here one day, and then I had to go to Syracuse. When I got back, it was over.

Q. And how long were you in Syracuse?
A. Two days.

Q. And you attended the trial but one day, but you wanted Mr. Mesick and Mr. Ottman to attend the trial; is that correct?
A. Yes."

The plaintiff Carlson testified that he met with the others at Cranston's home on February 3, 1967, before proceeding to Mr. Weatherwax's office, and he also testified as follows when examined by applicant's attorney:

"Q. Sir, do you have any agreement with your attorney, Mr. Weatherwax, concerning payment of his fee or the expnses –
A. No, sir.

Q. – for this action? A. No, sir."

The following is a portion of the testimony of Louis Longo, CMPA President and owner of a 360-acre "nearby" farm in Connecticut:

"Q. Yes. Now, did you, at that time, meet with any distant producers or with any attorney that represented distant producers in that litigation? A. As far as the *Allen* litigation and the *Blair*?

Q. Yes. A. I don't recall any meetings held specifically for that purpose, no.

Q. But did you take any steps to assist your distant or non-nearby members in respect

to presenting a position in that litigation, either *Blair* or *Allen*? A. Did we take any steps to assist?

Q. Yes, your non-nearby or distant producers in putting forth a position in that litigation? A. First – well, first we had no – I don't follow this question of assisting them.

Q. You have already testified that the Association filed a brief amicus curiae in the *Blair* case – A. That is right.

Q. – that they attempted to intervene in the *Allen* case, in both instances, in behalf of nearby producers and continuation of the differentials. A. May I say it has been entirely our feeling in defending the nearby differential that we were assisting our distant producers.

Q. That is not my question. Did you, in fact, take no action to assist distant and – A. It was our feeling that we were assisting the distant producers.

Q. You still haven't responded to my question. * * * Did you, in fact, authorize any attorney to take any steps, in either *Blair* or *Allen*, to represent the position that these current plaintiffs espouse in this action – in the *Blair* and *Allen* litigation. A. Here again, no, not directly.

Q. And you have testified that there were objections, previously, to this nearby differential by producers – as you call them,

up-country producers. Did you take any steps, at that time, to assist those producers? A. Yes. We based the objections on the fact that the producers were not acquainted with what constituted provisions or orderly marketing as far as the ordinary –

Q. I am not interested in your opinion of orderly marketing. A. It isn't my opinion.

Q. Did you take any steps that would constitute a challenge to this differential prior to the filing of this action? A. No."

* * * * *

"Q. Now, do you feel that you have to pursue the question of the ability of any of your members to bring a legal action and to consult an attorney? A. Well, it isn't a matter of the individual member, so much as the entire membership, itself. I think that the Association would pursue any matter in the same – with the same effect and in the same manner."

* * * * *

"Q. Did you ever come to my office, Mr. Longo? A. No, I have never been to your office.

Q. Did you ever attempt to contact me in any manner, whatsoever? A. No.

Q. Did any of your attorneys, prior to institution of either the *Blair* or *Allen* cases? A. No, none that I know of.

Q. Now, what other dairy farmers, other than the three that we have named, actually took part in any meeting or evidenced any specific requests for any legal action in this area? (Witness previously testified Cranston and others threatened action at meetings) A. Well, I don't know their names specifically. There were a number of dairy farmers."

* * * * *

"Q. And you own a dairy farm in the State of Connecticut, do you not? A. That's right.

Q. And you would be affected by the elimination of the differential; would you not? A. No more than any other producer in our organization, distant or far?

Q. Well, you would be affected; would you not? A. By the fact of disorderly marketing that would be created.

Q. That is not my question. You have been making speeches here. You would be affected financially, adversely, by the elimination? A. Yes. I would be affected in the same proportion as all other individuals."

Witness Kenneth Herrington testified as follows as to plaintiff Carlson during the collusion hearings:

"* * * Then I asked – I went to visit one of them, a Mr. Carlson, because I – this was

after the trial had taken place. I visited Mr. Carlson and asked him what he thought of it or he came and asked to get involved, or what happened, and he told me the field man from CMPA, a Mr. Bragg, had asked him to be a plaintiff in the case, and I asked him if he was bearing any of the expenses, and he said, 'No, Mr. Bragg, the field man, said we didn't have to worry about any of the expenses, that CMPA was bearing the expenses of any lawyer fees', and I said, 'Well,' — then, he said, 'Well, what made me mad at the CMPA is that they joined the side of the Government after they came to us and asked us to have the case', and I said — at this time, I said, 'Well, don't you feel something is wrong, they offered to pay the expenses of your lawyer, then they are on the other side', and he said, 'Well, it certainly doesn't look right,' but he said, 'I am not too happy with CMPA for doing this'."

The witness testified as follows under cross-examination by Mr. Weatherwax:

"Q. No, I said dismissed. Why do you believe it should be dismissed? A. Because of the way that it all started; the way that it was solicited; the way that Mr. Cranston had talked to me, told me, anyway, that it was brought up by CMPA, the fees were to pay the lawyers who were being paid by CMPA. He seems to have lost all control himself."

Another non-nearby producer, Paul Schmidt, stated as follows concerning his understanding that the CMPA

was representing non-nearby producers who desired to eliminate the nearby differential:

> "Your Honor, I am not acquainted with Court procedures, and I can't hear too good, so, if I step out of line, I need some guidelines. My name is Paul Schmidt. I am a CMPA member. I am not for or against anything. I would like more information. I was under the impression CMPA was representing us outside producers, and the only notice I had to appear was what I read in the CMPA Bulletin. I received no formal notice, but, lately, I heard the CMPA is representing the nearby producers, so, without any disrespect, I would like to know where I stand and if I am represented, to make a long story short." (T. 50)

On this same subject, an affidavit filed in *Cranston* related the following conversation with plaintiff Cranston prior to the hearings on collusion and inadequacy of representation.

> "MR. RYAN: If that case had been brought down here, there wouldn't have been any problem that I could see for the court here has ruled twice against the differential –
>
> MR. CRANSTON: Well, that's why they didn't want it brought down there. They wanted it tried up here.
>
> MR. RYAN: Well, that's why I was trying to see to what extent they were involved in bringing it up there because –

MR. CRANSTON: They brought it because they knew someone was going to bring it. They wanted to be able to control it. By bringing it first, why, they could. And they could say where it was going to be tried —".

* * * * *

MR. RYAN: The other side isn't really supposed to be involved, and it casts an unwholesome atmosphere over the litigation, the courts feel, when that's so, you see.

MR. CRANSTON: Well, that's right. That's right. And I felt all along they were playing with fire but they were desperate.

MR. RYAN: Well, that's what I mean. You see, they lost two cases and that's their last shot. And they are desperate, and when you're desperate you take desperate measures.

MR. CRANSTON: That's true, and that's what they did."

APPENDIX B

SHIPMAN & GOODWIN
Counselors at law
799 Main Street
Hartford, Connecticut 06103

November 24, 1970

A. Daniel Fusaro, Esq.
Clerk, United States Court of
Appeals for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: Cranston, *et al.* v. Hardin and
Guilian, *et al.*, Nos. 32,793-32, 796

Dear Mr. Fusaro:

I enclose for filing with the Court the original and three copies of a Response on behalf of appellees Albert Guilian, *et al.* to the "Opposition of Appellants Duncan, *et al.* to Motions of Cranston, *et al.*, and Guilian, *et al.*, for Supplementation of Decision" which was recently filed with the Court.

In view of the extensive number of filings thus far on the question of an appropriate remedy in this case since the Supreme Court's decision in *Zuber v. Allen* and the complicated nature of the questions presented, the Defendant Interveners are of the opinion that oral argument before this Court, as has been requested by

Plaintiffs, would serve to assist the Court in reaching its decision and they therefore join in Plaintiffs request to this effect.

Very truly yours,

/s/ Frederick U. Conard, Jr.

FUC: lwb
Enclosures

cc: John P. Weatherwax, Esq.
Walter Fleischer, Esq.
Charles P. Ryan, Esq.

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* Emphasis Petitioners'.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on behalf of all other persons in their class who are similarly situated and affected, *Plaintiffs*,	:	Nos. 32,793-796[1]
—against—	:	
CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, *Defendant*,	:	
ALBERT GUILIAN, GROVER C. ATWOOD and A. J. MALNATI, Individually and on behalf of all other persons in their class who are similarly situated and affected, *Defendant-Interveners*	:	

OPPOSITION OF DEFENDANT INTERVENERS ALBERT GUILIAN, *ET AL.* TO MOTION OF LEONARD DUNCAN, *ET AL.* AND ALLIANCE OF THE NORTHEAST DAIRYMAN "FOR CLARIFICATION AND ORDER DIRECTING IMMEDIATE TERMINATION OF ESCROWING AND NEARBY DIFFERENTIALS"

Defendant Interveners Albert Guilian, *et al.*, respectfully oppose the Motion of distant producers Leonard Duncan, *et al.*, and

---

[1] Defendant Interveners Albert Guilian, *et al.*, have not included the caption for Nos. 32,797-799 in this opposition in view of the fact that the motion opposed does not concern or request relief relevant to those cases.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 693-99—September Term, 1968.

(Argued June 12, 1969 Decided July 16, 1970.)

Docket Nos. 32793-99

No. 32793-96

Harold R. Cranston, Dale R. French, Helmer A. Carlson and David B. Phillips, Individually and on Behalf of All Other Persons in Their Class Who Are Similarly Sitauted and Affected,

Plaintiffs-Appellants,

—against—

Clifford M. Hardin, Secretary of Agriculture of the United States,

Defendant-Appellee,

—and—

Albert Guilian, Grover C. Atwood and A.J. Malnati, Individually and on Behalf of All Other Persons in Their Class Who Are Similarly Situated and Affected,

Defendants-Intervenors-Appellees.

C 2

No. 32797-99

Leonard Duncan, Kenneth Hewitt, *et al.*,

Appellants,

against

Harold R. Cranston, *et al.*, Clifford M. Hardin, Secretary of Agriculture of the United States, and Albert Guilian, *et al.*,

Appellees.

Before:

Moore and Smith, *Circuit Judges;*
Bartels, *District Judge.**

Consolidated appeals by plaintiffs, *Cranston, et al.*, and *Duncan, et al.*, dairy farmers, from various Orders and a Judgment entered on August 19, 1968 in the United States District Court for the Northern District of New York before the Hon. William H. Timbers (Chief Judge, District of Connecticut, sitting by designation in the Northern District of New York), in a suit by plaintiffs against the defendant, *The Secretary of Agriculture of the United States,* and *Guilian, et al.*, defendants-intervenors, which Judgment dismissed plaintiffs' complaint with costs.

Reversed and remanded.

John P. Weatherwax, Troy, N.Y. (James M. Strang, Troy, N.Y., of counsel), *for Appellants Cranston, et al.*

Walter H. Fleischer, Attorney, Department of Justice, Washington, D.C. (William D. Ruckelshaus, Assitant Attorney General, Washington, D.C., Justin J. Mahoney, United States Attorney for the District of Columbia, and Alan S. Rosenthal, Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee Hardin.*

Frederick U. Conrad, Jr., Hartford Conn. (Shipman and Goodwin, Hartford, Conn., and Theodore M. Space, Hartford, Conn., on the brief), *for Appellees Gullian, et al.*

Charles P. Ryan, Washington, D.C. (Edward J. Ryan and John J. Simard, Washington, D.C.), *for Appellants Duncan, et al., and The Alliance of Northeast Dairymen an Amicus Curiae.*

James M. Jeffords, Attorney General of the State of Vermont, Montpelier, Vt., *for the State of Vermont as Amicus Curiae.*

Per Curiam:

Plaintiffs, dairy farmers residing in Rensselaer County, New York, brought this action on behalf of themselves and all other persons in their class against the Secretary of Agriculture for an injunction against allegedly discriminatory and as such unconstitutional price differentials to milk producers authorized by the Secretary pursuant to a Connecticut Milk Marketing Order (the Order), 7 C.F.R. § 1015, et seq. (1968), based upon the location of such producers' farms. Declaratory relief was also sought. Three dairy farmers interested in supporting the price differentials were allowed to intervene as defendants. Upon the trial the issues to be resolved were: (1) whether the Agricultural Marketing Agreement Act of 1937 (the Act), 7 U.S.C. § 601, et seq., authorizes the Secretary to include in the

Order certain farm location differentials; (2) whether such differentials are unconstitutionally discriminatory; and (3) whether there is substantial evidence in the administrative record to support the Secretary's inclusions of such differentials in the Order. The trial court in comprehensive findings of fact and conclusions of law and a memorandum of decision after trial held that (1) the Act authorities farm location differentials; (2) such differentials are not constitutionally discriminatory; and (3) the administrative record supports the Secretary's inclusions of such differentials in the Order. Jurisdiction and venue, the propriety of a class action both as to plaintiffs and intervenor-defendants, claims of bias of the Judge, and the questioned adversary nature of the proceedings were all properly resolved by the court.

The farm location price differential issue arises because of a provision in the Order that

"1015.72 Farm location differentials.

(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that protion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thrusay, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments [then are described certain other geographic areas] * * * there shall be added 23 cents per hundredweight.

Plaintiffs attack these payments to so-called nearby milk producers as unconstitutionally discriminatory. Decision upon appeal from the trial court's holding of constitutionality and its dismissal of the complaint has been held in abeyance pending the outcome of two cases before the Supreme Court on writs of certiorari to the United States Court of Appeals for the District of Columbia Circuit entitled *Frederick T. Zuber et al. v. Russell Allen et al.*, and *Clifford M. Hardin, Secretary of Agriculture v. Russell Allen et al.*

There, as here, the issue of the constitutionality of the nearby farm price differential was presented to the Court.

In *Zuber* the District Court had issued a permanent injunction against further payments of the nearby farms price differential. The Court of Appeals had affirmed 402 F.2d 660 (D.C. Cir. 1968). The Supreme Court had granted certiorari, 394 U.S. 958, and on December 9, 1969 affirmed, 396 U.S. 168.

In view of the *Zuber* decision, the judgment below is reversed and the case remanded to the District Court for such proceedings, including the proper disposition of funds held in escrow during the proceedings and costs and related matters, and the entry of judgment thereon as may be appropriate in the light of *Zuber*.

APPENDIX D

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 10th day of September, one thousand nine hundred and seventy.

Harold R. Cranston, Dale R. French, Helmer A. Carlson and David B. Phillips, et al.,
Plaintiffs-Appellants,

v. No. 32797-99

Clifford M. Hardin, Secretary of Agriculture of the United States,
Defendant-Appellee

Albert Guilian, Grover C. Atwood and A. J. Malnati, et al.,
Defendants-Interveners-Appellees,
(and other cases).

It is hereby ordered that the motion made herein by counsel for the appellants Duncan, et al., to stay issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari Pursuant to Rule 41-B Federal Rules of Appellate Procedure

be and it hereby is denied.

Leonard P. Moore, USCJ
J. Joseph Smith, USCJ
John R. Bartels, USDJ

September 10, 1970

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HAROLD R. CRANSTON, ET AL.,

Plaintiffs,

–against–

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States,

CIVIL NO. 67-CV-38

Defendant

ALBERT GUILIAN, ET AL.,

Defendant-Interveners.

ORDER GRANTING MOTION FOR PRESERVATION OF STATUS QUO PENDING HEARING OF MOTION FOR MODIFICATION AND CONTINUATION OF EXISTING INJUNCTION

Upon presentation and consideration of Defendant-Interveners' verified Motion,

IT IS ORDERED, that the Motion praying entry of an Order restraining the Defendant Secretary of Agriculture, his agent, servants and employees, and all persons in active concert and participating with him, from publishing, whether in the *Federal Register* or elsewhere, any notice of termination of the farm location differential provisions of the Connecticut Milk Marketing Order set forth in 7 Code of Federal Regulations, § 1015.72, be, and hereby is, granted, to continue in effect from the date of this order until hearing and decision by this Court with respect to Defendant-Interveners' "Motion for Modification and Continuation of Existing Injunction in Order to Preserve Status Quo Pending Final Hearing and Action by this Court in Accordance with Mandate of United States Court of Appeals for the Second Circuit", unless dissolved at an earlier date by this Court.

Done and ordered at Albany on this 5th day of August, 1970 at 4:15.

/s/ James T. Foley
U.S. District Judge

This order is signed after hearing in Chambers with Court Reporter present. My reasons for signature of the order were stated by me for the record.

James T. Foley
U.S.D.J.

August 5, 1970

APPENDIX F

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

LEONARD DUNCAN, ET AL.,

Petitioners,

v.

HAROLD R. CRANSTON, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1970

/s/ John M. Harlan

Associate Justice of the Supreme Court of the United States

Dated this 8th

day of October, 1970

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Harold R. Cranston, Dale R. French, Helmer A. Carlson and David B. Phillips, Individually and on behalf of all other persons in their class who are similarly situated and affected,

Plaintiffs-Appellants,

v.

Orville L. Freeman, Secretary of Agriculture of the United States

Defendant,

and

Albert Guilian, Grover C. Atwood and A. J. Malnati, Individually and on behalf of all other persons in their class who are similarly situated and affected,

Defendant-Interveners.

Timbers, District Judge.*

QUESTION PRESENTED

This action was brought by six dairy farmers residing in Rensselaer County, New York, suing for themselves individually and on behalf of all other persons in their class similarly situated and affected.[1] They seek declaratory and injunctive relief against the Secretary of Agriculture. Three other dairy farmers residing in Litchfield County, Connecticut, and Berkshire County, Massachusetts, for

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*Chief Judge of the District of Connecticut, sitting by designation.

[1]Since commencement of the action, Roy E. Ottman and George Mesick, Jr., two of the six persons originally bringing the action, have sought leave to withdraw as plaintiffs.

themselves individually and on behalf of all other persons in their class similarly situated and affected, were permitted to intervene as defendants. The essential questions presented are: (1) whether the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, authorizes the Secretary of Agriculture to include in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015, *et seq.* (1968), certain farm location differentials, 7 C.F.R. § 1015.72 (1968), which have been in effect since 1959; (2) whether the farm location differentials are unconstitutionally discriminatory; and (3) whether there is substantive evidence in the administrative record to support the Secretary's inclusion of these differentials in the Connecticut Milk Marketing Order.

After an eight day trial, the Court holds that the Act does authorize the farm location differentials, that such differentials are not unconstitutionally discriminatory, and that there is substantial evidence in the administrative record to justify inclusion of these differentials in the Connecticut Milk Marketing Order. Accordingly, a permanent injunction enjoining the Secretary of Agriculture from administering the Connecticut Milk Marketing Order in such a way as to give effect to the farm location differentials is denied.

JURISDICTION AND VENUE

Jurisdiction is founded upon 28 U.S.C. § 1331(a), 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601, *et seq.*

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391 (e).

PROPRIETY OF CLASS ACTION AND CLASS ACTION DEFENSE; ADVERSARY NATURE OF PROCEEDINGS

Pursuant to Rule 23(c)(1), Fed. R. Civ. P., the Court on October 20, 1967, after hearing evidence, entered two

orders: one permitting the named plaintiffs to maintain the instant action as a class action and the other permitting the named defendant-interveners to maintain a class action defense.

With respect to the named plaintiffs, the Court determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015, *et seq.* (1968), where the farms of such producers are located *outside* the area described in 7 C.F.R. § 1015.72(a) (1968) (in short, those who do *not* qualify for the 46¢ differential).

With respect to the three named defendant-interveners, the Court likewise determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015.72 (a) (1968) (in short, those who *do* qualify for the 46¢ differential).

In view of the recent decision of the United States Court of Appeals for this Circuit in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2 Cir. 1968), the Court on April 22, 1968 directed that all members of plaintiffs' and defendant-interveners' classes be given formal notice of the pendency of the action and an opportunity to be heard with respect to the continued maintenance of the action as a class action. The notices were sent by April 24, 1968 and made returnable on May 15, 1968.

Prior to the Court's order of April 22, 1968, Kenneth Hewitt and Leonard Duncan, members of plaintiffs' class, filed two papers entitled "Motion For Leave To Intervene Under Rule 24 or to Otherwise Enter Action Under Rule

23 for Purpose of Taking Depositions, to Move Dismissal of Suit and for Other Related Relief," and "Answer of Intervenors and Motion to Dismiss Action, for Disposition of Escrow Fund and Other Relief." Because these papers made allegations of collusion which if true would not only have merited reversal of the class action orders but dismissal of the action, a hearing was similarly directed on May 15, 1968.

The Court thereafter held exhaustive hearings on May 15, May 27, and June 10, 1968 at which time all questions relating to the propriety of the maintenance of this action as a class action and all questions relating to Hewitt's and Duncan's claim of collusion were explored. Every interested person was given an opportunity to be heard and to present evidence through the testimony of witnesses and by means of exhibits. The complete record of all prior proceedings in this case was available for inspection by all interested persons at the Albany seat of Court from May 9, 1968.[2]

The evidence presented not only does not in any way justify dismissal of the action but it clearly merits reaffirmation of the Court's orders of October 20, 1967 permitting plaintiffs and defendant-intervenors to maintain

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[2] The Court's order of April 22, 1968, provided for the immediate availability of the record at the Albany seat of Court. At the time the order was entered, the undersigned was sitting by designation in the Southern District of New York while the record was located at Bridgeport, Connecticut, the undersigned's official station. It was not until May 6, 1968, when the undersigned's assignment in the Southern District of New York was completed, that the undersigned found it possible to return to Bridgeport to prepare the record, comprising numerous cartons, for shipment to Albany. The undersigned, however, is completely satisfied that all who desired to examine the record were aware of its availability after May 9, 1968, and had ample opportunity to study it. No prejudice resulted from the delay.

this action as a class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P. Plaintiffs' class of approximately 250 persons and defendant-interveners' class of approximately 3000 are without any doubt "so numerous that joinder of all members is impracticable." No one has, nor can, dispute that there are questions of both law and fact common to the classes and that the claims of plaintiffs and defenses of defendant-interveners are typical of the claims and defenses of their classes. Furthermore, as a practical matter, the adjudication of the differentials' validity with respect to individual members of the classes would be dispositive as to all class members because the differentials cannot be enforced or withdrawn piecemeal.

The only issue which merits discussion is the charge of collusion raised by Hewitt and Duncan. Also involved here is the issue of fairness and adequacy of representation with respect to plaintiffs' maintenance of this action as a class action. Basically, Hewitt and Duncan claim that the Consolidated Milk Producers' Association (CMPA), formerly the Connecticut Milk Producers' Association, solicited plaintiffs to bring this action in the Northern District of New York, and through payment of plaintiffs' counsel fees and other means have acted to control this action for the benefit of defendant-interveners' class who constitute the majority of the Association's members.

There is no question but that CMPA as an organization is interested in the continuation of farm location differentials. The vast majority of its members receive these differentials and feel that it will be to their benefit to continue to receive them. Defendant-interveners are members of CMPA and their counsel also serves as

counsel to CMPA. Furthermore, CMPA readily admits that after the farm location differentials in the neighboring New York-New Jersey Milk Marketing Order were held invalid by the Court of Appeals for the District of Columbia in 1966, the Association was troubled by the consequential uncertainty surrounding the validity of the Connecticut differentials. Part of this concern derived from the fact that a minority of its members, including all the named plaintiffs, did not receive the differentials and had vocally expressed their unhappiness with the situation. In fact, as established by the credible evidence, plaintiff Cranston had discussed the institution of a legal action to challenge the differentials with his long-time friend and neighbor, Attorney John P. Weatherwax, both before and after the decision in the District of Columbia.

It was only after Attorney Weatherwax had agreed to undertake such an action challenging the differentials, that Cranston was contacted on January 27, 1967 by a CMPA official who had heard rumors that Cranston and others intended to commence a suit. This contact was the result of a decision on January 25, 1968 by CMPA to aid any members undertaking either to challenge or defend the differentials by reimbursing such members for reasonable expenses and attorney fees. The CMPA official explained the policy and mentioned a name of a potential attorney, but Cranston said that he already had his own. The official told Cranston that he would like to check on his reputation and see what kind of an attorney he was and if he was capable, because the Association was concerned about having good attorneys on both sides of the question. Aside from the offer to reimburse for reasonable expenses and this conversation and a subsequent meeting between CMPA officials,

plaintiffs and Attorney Weatherwax, there is nothing to suggest that CMPA in any way acted improperly. But most importantly, there is not an iota of credible evidence that CMPA, defendant-intervenor, or defendant, acted, attempted to act, or even desired to act, to control plaintiffs' conduct in these proceedings. On the contrary, the record clearly demonstrates that plaintiffs for a number of years have been keenly interested in the abolition of the differentials, that they are at this time just as keenly interested, and that their counsel, Attorney Weatherwax, has at all times consistently, expertly and with the highest professional sense of duty to plaintiffs endeavored to represent their aims. Attorney Weatherwax has forthrightly, earnestly, and unceasingly prosecuted this lawsuit to enjoin the application of the differentials. He has conducted his case as any gentleman and lawyer should and would and has never conceded a point nor failed to present a plausible argument.

The Court is fully cognizant that the payment by one side in an action of an opposing counsel's legal fees is a red flag as to collusion. See *United States v. Johnson*, 319 U.S. 302 (1943). But in the instant situation, the Association is in a unique position — it is a democratic institution composed of members on both sides of the question and it is duty-bound to serve the interests of all its members. Certainly under these circumstances, the Association's offer to reimburse any of its members for expenses does not give rise to collusion per se. Rather the question must be whether the Association has in any way acted to control plaintiffs' conduct of the lawsuit. Cf. *San Francisco v. Boyd*, 22 Cal.2d 685, 140 P.2d 666 (1943). If the Court thought that there was even the slightest attempt to exert such control,

it would not only reverse its class action orders but it would dismiss the entire action. The Court, however, is thoroughly convinced that no such attempt was made, that the proceedings have been of an adversary nature on the highest level, and that plaintiffs have fairly and more than adequately represented the other members of their class. The Court therefore not only refuses to dismiss this action but reaffirms its decision to permit it to proceed as a class action.[3]

* * * * *

CONCLUSION

The Court concludes that this action presents a justiciable controversy over which the Court has jurisdiction. Plaintiffs and defendant-intervenors are properly representative of the classes of dairy farmers previously designated by the Court.

The Court further concludes that the farm location differentials in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015.72 (1968), are authorized by Section 8c(5)(B) of the Agricultural Adjustment Act of 1937, 7 U.S.C. § 608c(5)(B), and are otherwise legal and completely valid provisions of that Order. Therefore the

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[3] Three members of plaintiffs' class have asked to be excluded therefrom and plaintiffs' counsel has asked the Court to grant this request. The action, however, is a class action pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P., and, unlike a class action pursuant to Rule 23(b)(3), an otherwise proper member of the class cannot be excluded simply because he expresses such a desire.

The Court does, however, modify its order of October 20, 1967, with respect to the maintenance of this action as a class action by plaintiffs to the extent of eliminating as named plaintiffs Roy E. Ottman and George E. Minick, Jr., who have signified their desire to withdraw as plaintiffs.

Court denies a permanent injunction enjoining the Secretary of Agriculture from continuing the differentials and directs that judgment be entered in favor of defendant and defendant-intervenors.

This Memorandum of Decision together with separately stated Findings of Fact and Conclusions of Law constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Plaintiffs' motions to strike evidence, including renewal of motions made at the trial and motions which they were granted leave to file subsequent to trial have been carefully considered. The Court denies the motions insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law made herein pursuant to Rule 52, Fed. R. Civ. P., in all other respects the motions are dismissed as moot.

Since this is a class action and judgment will therefore bind all members of plaintiffs' class, the Court deems it advisable to direct the Clerk to delay entry of judgment in favor of defendant and defendant-intervenors for a period of fifteen days and to direct that within that period plaintiffs' counsel shall mail to all members of plaintiffs' class notice of this Court's decision together with an explanation of the effect thereof and a statement as to whether plaintiffs intend to prosecute an appeal. If plaintiffs do not intend to prosecute an appeal, notice must be given of the means by which members of the class may seek leave to file such an appeal and the time limit involved.

Furthermore, because this is an action for an injunction, entry of judgment will automatically and immediately terminate the preliminary injunction granted by

order of this Court, Foley, C.J., on March 9, 1967, unless the Court directs otherwise. Rule 62(a), Fed. R. Civ. P. Therefore, in order to fully protect the rights of all parties and to maintain the status quo to permit an appeal, the Court orders that the injunction granted on March 9, 1967 shall continue in force until entry of judgment and thereafter for a period of sixty days upon such terms and conditions as contained in the order of March 9, 1967 unless otherwise directed by the Court. If within sixty days a notice of appeal is filed, the injunction shall continue in force during the pendency of the appeal unless dissolved or modified by the appropriate court.

ORDER

ORDERED as follows:

(1) That the Court's orders of October 20, 1967 with respect to maintenance of this action as a class action by plaintiffs and defendant-intervenors are affirmed in all respects except that Roy E. Ottman and George Merrick, Jr. are eliminated as named plaintiffs.

(2) That all motions to strike evidence, insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law herein pursuant to Rule 52, Fed. R. Civ. P., are denied; in all other respects the motions to strike evidence are dismissed as moot.

(3) That upon the expiration of fifteen days the Clerk shall enter final judgment in favor of defendant and defendant-intervenors dismissing plaintiffs' complaint with costs.

(4) That plaintiffs' counsel within fifteen days shall mail to each member of plaintiffs' class a notice of this Court's decision herein together with an explanation thereof and with a statement as to whether plaintiffs will prosecute an appeal. In the event that plaintiffs do not intend to appeal, notice must also be given as to the means by which members of plaintiffs' class may seek leave to file such an appeal and the time limit involved.

(5) That the injunction granted pursuant to an order of this Court dated March 9, 1967 shall continue in effect until entry of judgment and thereafter for a period of sixty days under such terms and conditions as contained in the Court's order of March 9, 1968, unless the Court directs otherwise.

(6) That if a notice of appeal is filed in this action within sixty days after entry of judgment the injunction granted on March 9, 1967 shall continue thereafter during the pendency of the appeal subject to dissolution or modification at any time by the appropriate court.

Dated at Albany, New York, this 2nd day of August, 1968.

WILLIAM H. TIMBERS
United States District Judge
Sitting by designation

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,
Northern District of New York.

[Same Title.]

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's Memorandum of Decision filed herein, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Findings of Fact

1. Plaintiffs are four dairy farmers (milk producers) located in New York State. They bring this action individually, and as representatives of the class of approximately 250 milk producers who do not receive "farm location differentials" pursuant to Section 1015.72(a) of the Order regulating the handling of milk in the Connecticut Milk Marketing Area, 7 C.F.R. §1015 (1968).

2. Three other dairy farmers located in Connecticut and Massachusetts were permitted to intervene as defendants on behalf of themselves as individuals, and as representatives of the class of approximately 3000 milk producers receiving farm location differentials pursuant to Section 1015.72(a) of the Connecticut Marketing Order.

3. Plaintiff Cranston has for eight years been opposed to the Connecticut Farm Location Differentials. In 1966 Cranston discussed with his long-time friend and neighbor, attorney John P. Weatherwax, the possibility of bringing legal proceedings challenging the differentials. On January 27, 1967, after Cranston, French

and Carlson had definitely decided to commence an action, Cranston was informed by the Consolidated Milk Producers' Association, (CMPA), formerly Connecticut Milk Producers' Association, that CMPA would reimburse members for reasonable expenses incurred in maintaining or defending an action involving the validity of farm location differentials. CMPA, a democratic organization, was motivated by the fact that its members included both those who did, and those who did not, receive the differentials and by the fact that great uncertainty surrounded the differentials. Cranston informed CMPA that he had his own attorney, Mr. Weatherwax. The Association official told Cranston that they would like to check the attorney out as to his reputation since the Association was concerned that both sides should be well represented by competent attorneys. CMPA's official position favors the differentials, and a majority of its members receive them; CMPA's counsel represents defendant-interveners. CMPA officials, plaintiffs, and plaintiffs' attorney met once prior to the filing of this action.

4. Neither defendant nor defendant's counsel knew that this suit would be instituted prior to its actual institution, nor did they have any contact with plaintiffs or plaintiffs' counsel prior to the institution of this action.

5. CMPA at no time has influenced, attempted to influence or in any way affected or controlled plaintiffs' conduct of this action. Nor have defendant-interveners or defendant attempted to exercise control over or influence plaintiffs' conduct of this suit.

6. Plaintiffs and defendant interveners have faithfully, earnestly and forthrightly represented the interests of their respective classes. The attorneys for each class have likewise acted in a thoroughly professional and

expert manner. The entire record indicates that this action has been conducted as an adversary proceeding on the highest level. In short, plaintiffs and defendant-interveners have more than fairly and adequately represented the members of their respective classes.

7. The complaint, filed on February 9, 1967, alleges the invalidity, on several grounds, of an action of the Secretary of Agriculture in promulgating the aforementioned provision in the Connecticut Order under the authority contained in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*

8. The challenged order provision results in producers whose farms are located in two specified geographical areas receiving a differential over and above the uniform price for milk of 46¢ and 23¢ per hundredweight, respectively, for their milk which is priced under the Order depending upon the designated area in which their farms are located. The Order describes the marketing area as follows:

> "§1015.2 Connecticut marketing area.
>
> 'Connecticut marketing area' referred to in this part as the 'marketing area', means all territory within the State of Connecticut, together with all waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by government (municipal, State or Federal) installations, institutions or other establishments."

The Order sets forth the provisions relating to the farm location differentials, including the areas affected, as follows:

"1015.72 Farm location differentials.

(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush, Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight."

9. In accordance with the provisions of the Act, the Secretary of Agriculture promulgated the Connecticut Milk Order, including the challenged provision partially effective on March 1, 1959, and fully effective April 1, 1959, following notice, public hearing, findings based on the evidence introduced at the hearing, and a favorable referendum among producers supplying the proposed marketing area.

10. The Final Decision published by the Secretary incident to the promulgation of the Order on February

11, 1959, discloses that the Secretary included the "farm location differential" provisions under his authority to make adjustments to the uniform producer price contained in Section 608c (5)(B)(ii) of the Act as an adjustment for "market differentials customarily applied by handlers."

11. The Secretary of Agriculture, in subsequent findings based on evidence adduced at subsequent public hearings, reaffirmed and rejustified his original findings in February 1959, with respect to the economic necessity for and the validity of the "farm location differential" provisions in the Connecticut Milk Marketing Order.

12. Where the circumstances warranted it, the Secretary of Agriculture has included provisions in other marketing orders for preferential payments to producers based solely on the location of their farms nearby the market.

13. Federal price regulation of milk was first authorized by the Agricultural Adjustment Act of 1933. This Act provided for marketing agreements and for the issuance of licenses by the Secretary of Agriculture regulating the pricing of milk to producers by handlers. Pursuant to this authority, the Secretary of Agriculture issued many licenses regulating the handling and pricing of milk throughout the United States in the areas described in the licenses.

14. Among the stated purposes of the amendments to the Agriculture Adjustment Act in 1935, as they affected milk, were those which were designed to reinforce the existing practices of cooperative associations and to carry forward the methods employed under licenses

issued pursuant to the 1933 Act. They were also intended to adopt the present practices of business. These amendments, among others, provided for the adjustments to the uniform producer price for "volume, market and production differentials customarily applied by handlers."

15. Prior to 1933, cooperative associations, as a part of their voluntary methods of pricing milk to producers, gave preferential treatment to nearby producers. This practice was also reflected in the licenses issued under the Agricultural Adjustment Act of 1933. The practice of giving preferential price treatment to producers whose farms were located nearby the market was carried over in some orders issued following the 1935 amendments.

16. The Agricultural Marketing Agreement Act of 1937, re-enacted the provisions, as they affected milk marketing orders, of the 1935 amendments to the Agricultural Adjustment Act. Section 4 of the 1937 Act expressly validated existing orders, regulations issued pursuant thereto, and the acts of the Secretary in connection with licenses and orders issued under the AAA. The Conference Committee Report incident to the amendatory legislation expressly stated that Section 4 was to remove all doubts about the validity of actions of the Secretary as reflected in existing orders.

17. The draftsmen of the language of Section 608c (5)(B)(ii) considered the terms "volume, market and production differentials customarily applied by handlers" as embracing the existing practices of cooperatives and the existing methods in licenses which gave recognition to many and varied differentials which could be described as associated with the words, "volume", "marketing" and "production" practices.

18. There were in existence in the various marketing areas in 1935 many different differentials which could be described as based upon or associated with "volume", "market", and "production".

19. The language in the Committee Reports dealing with marketing orders which accompanied the AAA of 1935, when read in its entirety discloses that, in order to reinforce the many and varied existing practices of cooperative associations and methods employed in licenses in pricing producer milk, the words of "volume", "market", and "production" as used to describe differentials in Section 608c(5)(B)(ii) were descriptive of types of differentials.

20. Among the existing differentials practiced by cooperatives and methods employed in licenses were those which gave preferential price treatment to producers based upon the location of their farms nearby the market. This type of differential is within the category of "market differentials customarily applied by handlers."

21. There has been no showing by plaintiffs that the differentials established by Section 1015.72(a) and (b) prohibit the movement of their milk into the Connecticut Marketing Area or that such differentials otherwise constitute a "trade barrier" within the meaning of Section 608c(5)(G) of the Act.

22. The administrative record contains evidence sufficiently substantial to justify the Secretary's promulgation of a nearby differential in his Connecticut order.

Conclusions of Law

1. This is an adversary action presenting justiciable issues over which this Court has jurisdiction pursuant to

28 U.S.C. §§ 1331(a), 1337, 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601 *et seq.*

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(e).

2. This is a proper class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., with respect to plaintiffs' and defendant-interveners' classes as set forth in this Court's orders of October 20, 1967.

3. The farm location differentials contained in Sections 1015.72(a) and (b) of the Order regulating the handling of milk in the Connecticut Marketing Area, 7 C.F.R. § 1015 (1968), are market differentials customarily paid by handlers subject to the Order and as such are authorized pursuant to Section 608c (5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601, *et seq.*

4. The farm location differentials are not "trade barriers" and do not violate Section 608c (5)(G) of the Act.

5. The farm location differentials are not unconstitutionally discriminatory.

6. The Secretary's findings with respect to the inclusion of the farm location differentials in the Connecticut Order is supported by substantial evidence in the administrative record.

Dated at Albany, New York, this 2nd day of August, 1968.

WILLIAM H. TIMBERS
United States District Judge
Sitting by designation